Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

ABX AIR, INC.,

Petitioner,

v.

AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Labor relations between air carriers, their employees, and the collective bargaining representatives of such employees are governed by the Railway Labor Act, 45 U.S.C. §§ 151-188 ("RLA" or "the Act"). Two express purposes of the RLA are: (1) "To avoid any interruption to commerce or to the operation of any carrier engaged therein;" and (2) "[T]o provide for the prompt and orderly settlement of all disputes growing out of grievances. . . ." 45 U.S.C. §§ 151(a)(1), (5). To achieve these ends, Section 204 of the RLA, 45 U.S.C. § 184, requires that air carriers and pilot labor organizations submit contractual grievances to binding arbitration. The questions presented are:

(1) Whether a pilots' union may lawfully implement a concerted cessation of otherwise voluntary pilot services for the purpose of exerting economic pressure to coerce a carrier to accede to the union's interpretation of a contractual grievance, or "minor dispute," already submitted to mandatory arbitration.

(2) Whether a district court's RLA jurisdiction to enjoin "self-help" in aid of a minor dispute is limited by the definition of "strike" contained in the National Labor Relations Act, 29 U.S.C. § 142(2), or extends, as well, to other forms of economic pressure applied to coerce the favorable resolution of a minor dispute.

(3) Whether an air carrier's demonstrated loss of $3.2 million, caused by its pilots' union's orchestration of a concerted ban on voluntary bidding for open flying, establishes "any interruption" to that carrier's "operations" sufficient to warrant injunctive relief under the RLA.

RULE 29.6 STATEMENT

Petitioner, ABX Air, Inc., is wholly owned by Airborne, Inc.

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ABX Air, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 266 F.3d 392. The findings of fact, conclusions of law, and judgment entered by the district court (App., *infra*, 17a-27a) are not reported. An earlier, unpublished, opinion of the court of appeals (App., *infra*, 30a-32a) is reported at 142 F.3d 431 (6th Cir. 1998). An earlier order of the district court denying preliminary injunctive relief (App., *infra*, 33a-41a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 19, 2001 (App., *infra*, 1a, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction below arose under 28 U.S.C. §§ 1291, 1331, and 1337(a).

STATUTORY PROVISIONS INVOLVED

Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 204 of the Railway Labor Act, 45 U.S.C. § 184, provides:

> The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936, before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes. It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title. Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

INTRODUCTION

The decision below burdens an already-ailing industry with an intolerable misreading of the Railway Labor Act. By expressly sanctioning an airline pilots' union's resort to economic self-help for the purpose of coercing the favorable outcome of a contractual grievance, the lower court grants airline unions a bargaining lever that Congress and this Court have expressly denied them. The losers in this transaction are the traveling and shipping public, the air carriers struggling to meet the public's needs, and the plain language and purpose of the RLA and this Court's decisions applying it.

STATEMENT OF THE CASE

1(a). In 1926, Congress enacted the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151-188, to govern labor relations on the Nation's rail carriers. The Act contains provisions regulating the making and enforcement of collective bargaining agreements between such carriers and the labor organizations representing their employees. Disputes of those two types, the making and enforcement of agreements, have been identified by the use of two terms that do not appear in the RLA. "Major disputes,"

> [r]elate[] to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one. . . . [Major disputes] look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

Consolidated Rail Corp. v. Railway Labor Executives' Assn., et al., 491 U.S. 299, 302 (1989) (hereinafter "*Conrail*") (quoting *Elgin, J. & E. Ry. Co. v. Burley, et al.*, 325 U.S. 711, 723 (1945) (hereinafter "*Burley*"), *aff'd on reh'g*, 327 U.S. 661 (1946)).

A "minor dispute," on the other hand,

> [c]ontemplates the existence of a collective bargaining agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation . . . . [In a minor dispute,] the claim is to rights accrued, not merely to have new ones created for the future.

Id. at 303 (quoting *Burley*, 325 U.S. at 723).

(b). Congress passed the Railway Labor Act because it had "long concerned itself with minimizing interruptions in the Nation's transportation services by strikes and labor disputes" arising out of both major and minor disputes. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 687 (1963).[1] These concerns gave rise to three of the five purposes stated in Section 1(a) of the Act:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein, . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions [i.e. major disputes]; [and] (5) to provide for the prompt and orderly settlement of all disputes growing out of

1. At pages 685-89 of its decision in *Central Airlines*, this Court traced the development of the Railway Labor Act, from its 1920 precursor, 41 Stat. 469, through the 1936 amendments, which extended the Act "to cover the then small-but-growing air transportation industry," *id.* at 685. *See generally* 49 Stat. 1189, 45 U.S.C. §§ 181-188. *See also Brotherhood of Locomotive Eng'rs v. Louisville & Nashville R.R. Co.*, 373 U.S. 33, 36-39 (1963) (hereinafter "*Louisville*").

> grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions [i.e. minor disputes].

45 U.S.C. §§ 151(a)(1), (4), (5).

(c). "Implementing such goals," *Central Airlines*, 372 U.S. at 689, Congress did two things. First, the Act imposes the general

> duty [upon] all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier . . . .

45 U.S.C. § 152, First. The "core duties" of Section 2, First to "make and maintain agreements" and "to settle all disputes," *Conrail*, 491 U.S. at 310, lie at the "heart" of the RLA, *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969). They apply to the settlement of both major and minor disputes. *Burley*, 325 U.S. at 725 ("The primary provisions affecting the duty to treat are found in Sections 2, First and Second, imposing the general duty as to all disputes, both major and minor, . . .").

(d). More concretely, Congress also fashioned mandatory dispute-resolution procedures for all major and minor disputes. With respect to major disputes, the Act "requires the parties to undergo a lengthy process of bargaining and mediation." *Conrail*, 491 U.S. at 302. Until those mandatory procedures are exhausted, "the parties are obligated to maintain the status quo . . . [and] district courts

have subject matter jurisdiction to enjoin a violation of the status quo pending completion of the required procedures. . . ." *Id.* at 302-03.[2]

The major dispute "status quo" requirement prohibits the premature resort to "self-help" by either party to the dispute. *See Shore Line*, 396 U.S. at 149-152. "Self-help" is another term that is neither used in, nor defined by, the Act. The RLA is "wholly inexplicit as to the scope of allowable self-help." *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 442 (1989) (quoting *Jacksonville Terminal Co.*, 394 U.S. at 391; *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 447-448 (1987)). "Self-help" includes the "full range of whatever peaceful economic power [the parties] can muster once they have 'unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute. . . .' " *Id.* (quoting *Jacksonville Terminal Co.*, 394 U.S. at 392). Other decisions of this Court have described "self-help" as the use of "economic weapons, including the strike[,]" *Shore Line*, 396 U.S. at 155;[3] the "interplay of economic force[,]" *Louisville*, 373 U.S. at 40; and the "resort to economic duress[,]" *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 34 (1957) (hereinafter "*Chicago River*").

2. The term "status quo" does not appear in the Act. Its statutory bases are Sections 5, First, 6, and 10, along with 2, First, 45 U.S.C. §§ 155, First, 156, 160, and 152, First, of the RLA. *See Detroit and Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 150-151, 152 (1969) (hereinafter "*Shore Line*").

3. "Strike" is yet another term that does not appear within the text of the RLA. As discussed *infra*, the lower court's too-crabbed understanding of that term, as used both in this Court's decisions under the Railway Labor Act, and as defined by Congress in the National Labor Relations Act ("NLRA"), 29 U.S.C. § 142(2), caused it to stray from this Court's prior decisions, to create a conflict with two other circuit courts of appeal, and to undermine the express purposes of the Railway Labor Act.

If a major dispute remains unresolved through the Act's mandatory negotiation, mediation, and "cooling-off" procedures, the parties are released to engage in self-help. A union may then employ up to its "ultimate sanction," a strike, because Congress opted not to require "compulsory arbitration" to resolve major disputes. *See Brotherhood of Ry. and Steamship Clerks, et al. v. Florida E. Coast Ry.*, 384 U.S. 238, 244 (1966).

(e). For the category of minor disputes, however, Congress enacted a "statutory grievance procedure [that] is a mandatory, exclusive, and comprehensive system" for resolving such grievances. *Louisville*, 373 U.S. at 38. "A minor dispute in the railroad industry is subject to compulsory and binding arbitration before the National Railroad Adjustment Board . . . [which] has exclusive jurisdiction. . . ." *Conrail*, 491 U.S. at 303-04. "In the airline industry, . . . there is no national adjustment board; a minor dispute is resolved by an adjustment board established by the airline and the unions." *Id.* at 304 n.4. *See generally* 45 U.S.C. § 184; *International Ass'n. of Machinists v. Central Airlines, Inc.*, 372 U.S. 682 (1963). Adjustment board decisions of minor disputes are "final and binding" upon the parties, 45 U.S.C. § 153, First (m), and are enforceable in the district courts, 45 U.S.C. § 153, First (p). *See Central Airlines*, 372 U.S. at 688.

(f). Federal district courts have jurisdiction to enjoin self-help in aid of a minor dispute. *Chicago River*, 353 U.S. at 36, 39-42 (Norris-LaGuardia Act, 29 U.S.C. § 104, *et seq.*, does not deprive district courts of jurisdiction to enjoin threatened strike over unresolved minor disputes; rather, the requirement ". . . to settle all disputes, whether arising out of the application of . . . agreements or otherwise, . . ." is enforceable by injunction). *See also Louisville*, 373 U.S. at 41-42 ("[T]o allow one of the parties to resort to economic

self-help [to enforce its interpretation of a Board award] would violate [a] direct statutory command. It would permit that party to withdraw at will from the process of settlement that Congress has expressly required both parties to follow.").

2(a). Doing business under the name Airborne Express, Petitioner, ABX Air, Inc. ("ABX" or "Petitioner"), engages in the interstate air carriage of time-sensitive materials. The more than 700 pilots (hereinafter "crewmembers") employed by ABX are represented, for collective-bargaining purposes, by the Airline Professional Association of the International Brotherhood of Teamsters, Local Union 1224 ("the Union" or "Respondent"). In June 1997, ABX and the Union entered into a successor collective bargaining agreement ("CBA"), App., *infra*, 18a,[4] thus ending the major dispute occupying the parties up to that point. The new CBA governed the rates of pay, rules, and working conditions of ABX's flight crewmembers, including matters of scheduling. *Id.*

(b). Under the CBA, ABX crewmembers use their seniority to bid for monthly schedules, or "lines of time," to be flown in the following month. Once all "regular" lines of time are awarded to the bidding crewmembers, a number of "open" trips remain available. Regarding "open" lines of time, Article 13, Section E of the CBA provides that: "Open Flying time shall be awarded in accordance with seniority to any crewmember who wishes to pick up additional flying (days and/or hours) on a previously scheduled work day, or day off." App., *infra*, 18a-19a. The CBA also provides procedures by which ABX can assign, in reverse-seniority order, leftover open flying trips that have not been voluntarily bid for by crewmembers. *Id.* The parties generally refer to

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4. All Appendix citations in this section of the Petition are to the district court's post-trial Findings of Fact and Conclusions of Law. App., *infra*, 17a-27a. The court below left the district court's findings of fact completely undisturbed. *Id.* at 9a.

this process as "junior manning." App., *infra*, 22a. Under Article 19, Section E.4 of the CBA, ABX must compensate a "junior-manned" crewmember with an additional two and one-half hour's pay, over and above what it must pay voluntary bidders. App., *infra*, 19a.

(c). After the new CBA was implemented, a number of contractual grievances, or minor disputes, arose between ABX and the Union. One such minor dispute concerned the CBA's "three-day-off rule," App., *infra*, 19a-20a, regulating the number of consecutive workdays ABX may schedule for crewmembers. *Id.* The parties agreed to expedited arbitration of the three-day-off minor dispute, the matter to be heard by the parties' System Board of Adjustment on October 3, 1997. App., *infra*, 20a.

(d). However, by early August, the Union had conceived and begun promoting a campaign to direct its members to cease volunteering for open lines of time. *Id.* Through meetings and telephone "hotline" messages to ABX crewmembers, the Union's President and Executive Board disseminated the "tacit but clear order," App., *infra*, 21a, of a "ban on open flying." *Id.* The Union's instructions were effective: No crewmember bid on open lines for September 1997, and October saw only thirteen voluntary bids for as many as 617 open flying lines. App., *infra*, 21a-22a. Dissenters were harassed "by other members, which was not discouraged by [the Union's] officials when they learned of it." *Id.* The purpose of the Union's "open flying ban" was to cause "all members to refrain from bidding on open lines of flight for as long as [ABX] refused to adopt the interpretation of the [CBA] urged by [the Union]" with respect to the three-day-off grievance. App., *infra*, 21a, 23a.

(e). The Union's open flying ban "cost [ABX] more than $200,000.00 in the form of increased compensation to [junior-manned] crewmembers who staffed the open lines

of flight on which [the Union's] members did not bid." App., *infra*, 22a. Because it was able to junior-man to cover its September and October schedules, ABX was not required to cancel any regularly scheduled flights. *Id.* However, the open flying ban also caused ABX to incur significant additional losses. The open flying ban prevented ABX from forecasting crew availability for Christmas-season charter flying it had profitably performed in the past. "[T]he loss caused by [ABX's] declining to bid on the Christmas season charter business [exceeded] $3,000,000 and [the Union's] ban on open flying was the cause of that loss." *Id.*

3(a). On September 10, 1997, ABX filed a complaint in the United States District Court for the Southern District of Ohio seeking declaratory relief, injunctive relief, and damages. Asserting jurisdiction under 28 U.S.C. §§ 1331 and 1337(a), ABX alleged that the open-flying ban violated the Union's duty under Section 204 of the RLA, 45 U.S.C. § 184, to resolve minor disputes by mandatory arbitration. ABX also asserted that the open-flying ban violated the Union's duty under Section 2, First of the Act, 45 U.S.C. § 152, First, to "exert every reasonable effort" to settle the dispute over the three-day-off grievance.

A week later, ABX sought a preliminary injunction against the ban. App., *infra*, 33a. The district court denied the requested relief, stating, in part, that it was "not convinced that the self-help [was] economic in nature, [and that ABX's] evidence submitted . . . for the purpose of establishing that [the open-flying ban] raises [ABX's] cost of doing business [was] inconclusive, . . ." App., *infra*, 40a-41a n.2. The Sixth Circuit denied ABX's interlocutory appeal of the district court's order as moot, the open-flying ban having ceased by that time. *Id.* at 30a-32a. The court of appeals then remanded the case to the district court for disposition of ABX's claims for declaratory relief and damages. *Id.* at 32a.

(b). Following a bench trial, the district court entered Findings of Fact and Conclusions of Law. App., *infra*, 17a-27a. On factual findings described in sections 2(a)-(e), *supra*, the district court concluded that the Union's promotion and direction of the open-flying ban for the purpose of coercing the outcome of a pending minor dispute violated both Sections 2, First and 204 of the RLA. *Id.* at 26a.

Aware of its jurisdiction to enjoin "strikes" in aid of minor disputes, App., *infra*, 26a, and aware that the Act does not define that term, the district court looked to the definition supplied by the NLRA, 29 U.S.C. § 142(2). There, Congress defined the word "strike" to "include[] . . . any concerted slowdown or other concerted interruption of operations by employees." App., *infra*, 24a. The district court then concluded that, for purposes of assessing its jurisdiction under Sections 2, First and 204 of the RLA,

> [t]he term "strike" includes concerted activity by employees, promoted and directed by their union, pending resolution of a minor dispute, that disrupts the employer's operations and causes a loss of business or profit with the intention of exerting pressure on the employer to change its interpretation of the existing collective bargaining agreement.

App., *infra*, 25a. Having found each of those factual predicates from the evidence, the district court entered judgment for ABX, *Id.* at 26a-29a, permanently enjoining the Union from conducting or directing a concerted refusal by its membership to bid on open lines of time in aid of any minor dispute with ABX. *Id.*[5]

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5. On the authority of *CSX Transportation, Inc. v. Marquar*, 980 F.2d 359 (6th Cir. 1992), the district court denied ABX's damages

(Cont'd)

(c). The district court grounded its legal conclusion upon this Court's reasoning in *Conrail*, 491 U.S. at 310. App., *infra*, 25a. There, after noting the Act's "core duties" to "make and maintain agreements" and to "settle all disputes . . . ," this Court stated that:

> [r]eferring arbitrable matters to the [Adjustment] Board will help to "maintain agreements," by assuring that collective-bargaining contracts are enforced by arbitrators who are experts in "the common law of [the] particular industry."

Conrail, 491 U.S. at 310 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960)). This Court next observed that:

> Delaying the onset of [a broad range of economic self-help] until the [Adjustment] Board determines on the merits that the employer's interpretation of the agreement is incorrect will assure that the risks of self-help are not needlessly undertaken and will aid "[t]he peaceable settlement of labor controversies."

Id. at 311 (quoting *Virginian Ry. Co. v. System Fed'n No. 40, Railway Employees*, 300 U.S. 515, 552 (1937)).

(d). The court of appeals reversed. It affirmed the district court's factual findings and its conclusion "that it had subject matter jurisdiction to determine whether the concerted actions

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(Cont'd)
claim, stating that "[m]oney damages are not available as a remedy for an illegal strike in support of a minor dispute." App., *infra*, 26a. That holding was the subject of ABX's cross-appeal below. The lower court did not reach that issue, App., *infra*, 14a, and ABX does not raise it here.

of the Union and its members under Article 13 [of the CBA] constituted an illegal strike." App., *infra*, 9a. The court of appeals also surveyed the distinction between "major" and "minor" disputes, noting that the RLA subjects each type of dispute to a mandatory resolution scheme. It cited this Court's *Conrail* decision, 491 U.S. at 302-303, for the rule that district courts may enjoin status quo violations pending resolution of the negotiation and mediation procedures required for major disputes. App., *infra*, 8a. With no corresponding authority, the lower court then observed that "no status quo requirement applies to minor disputes . . . [,]" pending mandatory adjustment-board resolution. App., *infra*, 10a. Absent a status quo requirement on the Union, the court reasoned, "[i]f there is no strike, there is no subject matter jurisdiction for the issuance of an injunction." App., *infra*, 9a. (citing *Conrail*, 491 U.S. at 304; *Chicago River*, 353 U.S. at 41-42; and its own earlier decision in *Marquar*, 980 F.2d at 369).

(e). Approving the district court's reference to the definition of "strike" contained in the NLRA, 29 U.S.C. § 142(2), the court of appeals next considered whether a strategically-motivated open-flying ban constituted a "concerted interruption of operations by employees," App., *infra*, 10a-14a, claiming to find guidance in three other cases: *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 238 F.3d 1300 (11th Cir. 2001), *cert. denied*, 532 U.S. __, 121 S. Ct. 1958 (2001) (hereinafter "*Delta*"); *Air Line Pilots Ass'n v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986); and *Texas Int'l Airlines, Inc. v. Air Line Pilots Ass'n*, 518 F. Supp. 203 (S.D. Tex. 1981). App. *infra*, 11a-12a. Though the courts in the *Delta* and *Texas International* cases had enjoined concerted pilot activities that amounted to less than traditional "strikes," the court below saw what it concluded was a "fundamental distinction:"

> Each of those cases involved a major dispute during which a union is required to maintain the status quo.

> In contrast, the dispute between ABX and the Union is a minor one, during which there is no requirement to maintain the status quo, thus making certain types of concerted action available that would not be during a major dispute.

App., *infra*, 12a. The court of appeals cited neither statutory nor decisional authority for the proposition that economic self-help proscribed during the course of a major dispute is nonetheless available in aid of a minor dispute. *See id.*

(f). The lower court then returned to the question whether the open-flying ban had worked an "interruption" of ABX's "operations." 29 U.S.C. § 142(2). Respondent's conduct "denote[d] an intent to pressure ABX in resolving the three-days-off [minor] dispute," App., *infra*, 13a; and "effectively exercise[d] strategic leverage in a minor dispute." *Id.* The lower court also reasoned that "higher costs and lost business opportunities can serve as evidence of an interruption of operations" *Id.* The court of appeals nonetheless held that ABX's $3.2 million additional operating costs and lost business opportunities, both found by the district court to have been caused by the open-flying ban, "do not qualify the crewmembers' concerted ban on open-flying as a 'strike.'" *Id.*

REASONS FOR GRANTING THE WRIT

The court below erroneously conflated and equated three terms whose meaning is essential to the proper application of the Railway Labor Act — "self-help," "strike," and "status quo." While neither term appears in the text of the Act, each has been used for decades by this Court and the lower federal courts to define the rights and obligations of parties governed by the RLA. By defining its minor-dispute injunction jurisdiction too narrowly, the lower court decided an

important federal question in a way that directly conflicts with this Court's decisions in *Chicago River* and *Louisville*. Rail and air carriers in the Sixth Circuit now lack any remedy to redress a broad range of "strike like" activity prohibited by the Act. The lower court's misapplication of the rules of *Chicago River* and *Louisville* also brings the decision below into direct conflict with the decision of the Eleventh Circuit in *Delta*, 238 F.3d at 1300, and of the Seventh Circuit in *United Air Lines, Inc. v. Int'l Ass'n of Machinists*, 243 F.3d 349 (7th Cir. 2001), which it neither cited nor discussed. Finally, the lower court's opinion raises an important question of federal law that has not been, but should be, settled by this Court, namely: Whether the scope of "self-help" enjoinable under Sections 2, First and 204 of the RLA is limited by the definition of "strike" found within the NLRA.

I. The Sixth Circuit has Decided an Important Federal Question In a Way that Conflicts with Relevant Decisions of this Court.

The lower court's decision arises from two erroneous legal premises: (1) That "[i]f there is no strike, there is no subject matter jurisdiction for the issuance of an injunction," (App., *infra*, 9a); and (2) That, because there is no status quo requirement in connection with minor disputes, "certain types of concerted action" are available during a minor dispute that would not be available during a major dispute. App., *infra*, 12a.[6] Both pronouncements directly conflict with

6. The lower court cited no authority for the second proposition. With respect to the first, the court cited to *Conrail*, 491 U.S. at 304; *Chicago River*, 353 U.S. at 41-42; and *CSX Transp. v. Marquar*, 980 F.2d 359, 369 (6th Cir. 1992). In *Conrail*, this Court noted that boards of adjustment have exclusive jurisdiction to resolve the merits of minor disputes, 491 U.S. at 318, while federal courts may enjoin strikes arising out of such disputes, *id.* at 304 (citing to *Chicago River*). Similarly, in *Marquar*, 980 F.2d at 369, the Sixth Circuit noted

(Cont'd)

the decisions of this Court in *Chicago River*, 353 U.S. at 30, and *Louisville*, 373 U.S. at 33, which recognize that federal court injunction jurisdiction encompasses *all* forms of "self-help" or "economic duress" in aid of a minor dispute. The district court, accordingly, had jurisdiction to enjoin any form of economic self-help in support of the three-day-off rule minor dispute, including the open flying ban at issue.

In *Chicago River*, 353 U.S. at 32, a railroad union called a strike in connection with several grievances pending before the National Railroad Adjustment Board. The carrier's complaint sought injunctive relief against the threatened strike, and a permanent injunction eventually issued. *Id.* at 32-33. The union appealed, arguing that the RLA's minor dispute resolution procedures were discretionary, allowing a party to resort to "alternative" remedies, such as "economic duress," in connection with an unresolved minor dispute. *See id.* at 34. This Court granted certiorari "to resolve an important question concerning interpretation and application of the Railway Labor Act," and also because of a conflict in the decisions of the Fifth and Seventh Circuits on the matter. *Id.* at 33 n.3.

This Court affirmed the issuance of the injunction. The Court relied not only on the plain language of the statute, but also its legislative history. As originally enacted, the RLA did not contain a mandatory dispute resolution system for minor disputes. *Id.* at 35-36. This was in "marke[d] (sic) contrast" with the requirements of Section 2, First. *Id.* at 36.

(Cont'd)

that strikes over minor disputes are prohibited (also citing to *Chicago River*). None of these decisions states or implies that strikes are the *only* form of self-help enjoinable under the RLA. On the contrary, as explained *infra*, *Chicago River* stands for the proposition that *all* forms of "economic duress" are enjoinable if employed to frustrate the minor dispute resolution procedures of the Act.

Accordingly, this "major weakness" of the 1926 Act was remedied in the 1934 amendments, when Congress enacted compulsory arbitration procedures for minor disputes, *Id.* at 36-37, 39. Federal courts, therefore, have "jurisdiction and power to issue necessary injunctive relief (to enforce compliance with the requirements of the Railway Labor Act)," including its minor dispute resolution provisions. *Chicago River*, 353 U.S. at 42 (quoting *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952)).

Several years later, this Court affirmed its *Chicago River* holding in *Louisville*, 373 U.S. at 33. There, a union threatened a strike to enforce its interpretation of an adjustment board award, and the district court enjoined the threatened strike. *Id.* at 35. The union argued that *Chicago River* injunctions were limited to pending adjustment board awards, but that, "once a favorable award had been rendered . . . the union becomes free to enforce the award as it will [including] resorting to economic force." *Id.* at 40. This Court "granted certiorari to consider an obviously substantial question affecting the administration of the Railway Labor Act." *Id.* at 36.

This Court disagreed with the union, affirming its decision in *Chicago River* that the minor dispute grievance procedures of the RLA are the "compulsory substitute for economic self-help." *See Louisville*, 373 U.S. at 39. "The broad premise of the petitioners' argument — that Congress intended to permit the settlement of minor disputes through the interplay of economic force — is squarely in conflict with the basic teaching of *Chicago River*." *Id.* at 40.

In this case, the district court found that the Union had conceived of, directed and promoted an open flying ban "in aid of the minor dispute over [the three-day-off rule] that was a subject of arbitration between the parties."

App., *infra*, 23a. The lower court affirmed this finding. *Id.* at 9a. Under *Chicago River* and *Louisville*, the "exclusive" method for resolution of that dispute was the minor dispute resolution procedures of the RLA, and resort to "economic duress" or "self-help" in connection with that dispute is illegal. However, the lower court's opinion expressly sanctions such "pressure" and "strategic leverage," placing it squarely in conflict with *Chicago River* and *Louisville*.

With respect to the lower court's second erroneous premise, it is true that, normally, no status quo obligation attaches to the actions of an *employer* during a minor dispute. *See Conrail*, 491 U.S. at 304 ("[T]his Court never has recognized a general statutory obligation on the part of an *employer* to maintain the status quo pending the Board's decision.") (emphasis added). Therefore, an *employer* may implement its "arguably justified" understanding of the collective bargaining agreement, pending resolution of a minor dispute. *See id.* at 310 (if the *employer's* claim of discretion to make a particular change in working conditions without prior negotiation with the union is arguably justified by the agreement, the *employer* may make the change, and the courts must defer to the arbitral jurisdiction of the adjustment board) (emphasis added).

Nothing in *Conrail*, or in any other decision of this Court, suggests that a *union* may engage in certain forms of self-help in aid of a minor dispute. Indeed *Chicago River* and *Louisville* stand for exactly the opposite proposition. There is, accordingly, no basis for the lower court's pronouncement that certain forms of self-help which are impermissible pending exhaustion of the major dispute resolution procedures are nonetheless allowed in connection with a minor dispute. To the contrary, the RLA contains mandatory resolution procedures for *both* major and minor disputes; self-help pending exhaustion of such procedures is not permitted

for *either* type of dispute. *See, e.g., Jacksonville Terminal Co.*, 394 U.S. at 380 (with respect to major disputes, the parties are required to submit to the successive procedures of the Act prior to resorting to self-help) (quoting *Burley*, 325 U.S. at 725); *Louisville*, 373 U.S. at 38-41 (minor dispute resolution procedures are compulsory; parties may not engage in self-help in connection with such disputes). *Long Island R.R. Co. v. System Federation No. 156,* 368 F.2d 50, 53 (2d Cir. 1966) (enjoining self-help activities where union "did not utilize the procedures of the Act for minor *or* major disputes") (emphasis added) (*citing Brotherhood of Ry. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238 (1966)).

By vacating the district court's injunction, the lower court refused to enforce the minor dispute resolution procedures of the RLA. This is an issue of grave importance to the administration of the RLA, as injunctive relief is often the only means available to federal courts to enforce the dispute resolution procedures of the Act and prevent disrupting incidents of self-help. In the Sixth Circuit, and two others, monetary damages are not available to carriers whose operations have been disrupted by unlawful self-help. *See Marquar*, 980 F.2d at 382; *Norfolk S. Ry. v. Brotherhood of Locomotive Eng'rs, et al.*, 217 F.3d 181 (4th Cir. 2000); *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992). Freeing air and rail unions to exert "economic leverage" in aid of minor disputes, unrestrained by injunctive or compensatory relief, undermines the central purpose of the Act and will result in greater turmoil and disruption to an important sector of our economy already beset by more than enough such problems.

The recent proliferation of airline "slowdown" and "self-help" cases bears ample witness to the recurrence of this issue under the Act. In addition to this case, and the *Delta* and *United* cases discussed in Section II, *infra*, the past two years

alone have seen much similar litigation across the country. *See, e.g., American Airlines, Inc. v. Allied Pilots Ass'n, et al.*, 228 F.3d 574 (5th Cir. 2000) (affirming finding of contempt and damages awarded in connection with pilot "sick-out" over minor dispute); *Aircraft Mechanics Fraternal Ass'n, et al. v. Northwest Airlines, Inc.*, No. 00-cv-2446 (D. Minn. Nov. 20, 2000) (restraining union and its members from engaging in a "concerted refusal to work overtime," and other self-help) (L. 32-34); *COMAIR, Inc. v. Air Line Pilots Ass'n Int'l*, No. 99-250 (E.D. Ky. Dec. 21, 1999) (restraining pilots' mechanical write-up campaign) (L. 35-39).

Lower federal courts are now dividing over the issue whether state law affords a cause of action to stranded passengers against the pilots' union that caused a carrier's inability to transport them. *Compare Kaufman, et al. v. Allied Pilots Assn., et al.*, __ F.3d __ (No. 00-11223, 5th Cir. Nov. 21, 2001) (interference-with-contract claims against pilots' union for continuing illegal "sick-out" after entry of temporary restraining order preempted by application of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) to RLA) (L. 1-13) *with Wolfson, et al. v. American Airlines, Inc., et al.*, __ F. Supp. 2d __, 168 LRRM (B.N.A.) 2569 (No. 00-CV-11802-PBS, D. Mass. Sept. 28, 2001) (*Garmon* doctrine does not preempt similar state law claims) (L. 14-31). Rail and air carriers require a uniform federal rule concerning the applicability of Section 2, First of the RLA to economic self-help in aid of either major or minor disputes. Because carriers within the Sixth Circuit now lack that protection, similar disruptions of carrier operations will certainly increase.

II. The Lower Court's Opinion Conflicts with Decisions of the Eleventh and Seventh Circuits.

The decision below holds that a pilot union's exercise of economic pressure upon a carrier, by causing its membership to withhold voluntary bids for "open flying," does not violate Section 2, First's twin duties to "maintain agreements" and to "settle all disputes . . . in order to avoid any interruption to . . . the operation of any carrier. . . ." 45 U.S.C. § 152, First. This holding, and the rationale said to support it, squarely conflict with the holdings of two other circuits on the same important matter — the *Delta* and *United* decisions issued earlier this year by the Eleventh and Seventh Circuits, respectively. The lower court's attempt to distinguish *Delta* as involving a major rather than a minor dispute[7] neither justifies nor ameliorates this conflict, nor renders it one only of "principle" or "approach." In any event, the question presented is so recurrent and so potentially disruptive to the provision of efficient transportation services that its resolution should not depend upon the circuit in which a particular case is brought.[8]

In *Delta*, 238 F.3d at 1300, the Eleventh Circuit held that Section 2, First of the Act imposes an affirmative obligation on a pilots' union to take all reasonable steps to halt a concerted open-flying ban, even absent proof that the union had authorized, directed, condoned, or ratified the ban.

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7. The lower court's opinion does not discuss the *United* decision. But, as that case also involved a major dispute, the court's attempt to distinguish *Delta* would likewise apply to *United*.

8. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (conflict in "principle" between decisions on important issue of tax administration resulted in grant of certiorari); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) (granting certiorari on important issue of constitutional law because of "apparent conflict in [the] approach to the question" by two circuit courts of appeal).

Id. at 1309. Only months later, the Seventh Circuit followed *Delta* to hold that the union representing the mechanics employed by United Airlines violated Section 2, First's obligation to take all necessary steps to halt various forms of concerted self-help activity, including a refusal to volunteer for overtime. *United Airlines*, 243 F.3d at 349. The opinion below found no duty under 2, First to act affirmatively to halt such concerted activity.

Rather, turning squarely in the other direction, the lower court held that Section 2, First permits this pilots' union affirmatively to direct and promote such conduct. The difference, said the court, lies in the fact that Delta's pilots and United's mechanics sought to exert economic leverage over a major dispute, while ABX's pilots "intended to pressure," App., *infra*, 13a, ABX and "exercise [] strategic leverage in a minor dispute, . . ." *Id.* Both the text of Section 2, First and this Court's decisions applying that text render this "distinction" meaningless.

As this Court has previously stated, "[t]he primary provisions affecting the duty to treat are found in Section 2, First and Second, *imposing the duty generally as to all disputes, both major and minor*, . . ." *Burley*, 325 U.S. at 725 (emphasis added). Likewise, in *Conrail*, this Court applied 2, First's "core duties," to "make and maintain agreements," and to "settle all disputes" to define the obligations of the parties to a minor dispute:

> Referring arbitrable matters to the Board will help to "maintain agreements," by assuring that [CBAs] are enforced by arbitrators. . . . Delaying the onset of [economic self-help] until the Board determines on the merits that the employer's interpretation of the agreement is incorrect will assure that the risks of self-help are not needlessly

> undertaken and will aid 'the peaceable settlement of labor controversies.'

491 U.S. at 310-11 (citations omitted). Finally, the lower court's purported distinction contravenes the plain language of the statute. Section 2, First's duties to "*maintain* agreements" (emphasis added) and to "settle all disputes, whether arising out of the application of such agreements or otherwise, . . . [,]" necessarily apply to minor disputes, which "relate[] either to the meaning or the proper application of a particular provision [of an existing agreement]. . . ." *Conrail*, 491 U.S. at 303. Against this statutory and decisional background, the lower court's disagreement with *Delta* is one over the scope of the "core duties" imposed by Section 2, First of the Act.[9]

The scope of the "core duties" applicable to those who provide air transportation services throughout the country should not depend upon the circuit in which a litigant brings a case. *See Central Airlines*, 372 U.S. at 691. ("[E]nforceability [of duty to arbitrate minor disputes] cannot be left to the laws of the many states, ...").

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9. The lower court also sought to distinguish *Delta* factually, stating, without specific reference to the Eleventh Circuit's opinion, that there "the Union argued that the CBA allowed all pilots to refuse to work overtime," while, at ABX "the Union's interpretation of the open-flying provision did not impair [the carrier's] ability to use junior-manning to assign flights." App., *infra*, 13a. But Respondent here raised precisely the same argument as the *Delta* union: "Based on the Union's interpretation, [the CBA] provides the crewmembers with an implicit right not to volunteer for open-flying time separately or in concert." App., *infra*, 9a. Moreover, in *Delta*, 238 F.3d at 1302 n.3, as in this case, the carrier could assign open time in inverse order of seniority, which was compensated at premium rates.

Air carriers, like ABX, operate throughout the country, and, as the *Delta* court observed, "[i]t is clear industry practice to structure flight schedules with 'open time' built in." 238 F.3d at 1307. Accordingly, this Court should resolve the circuit conflict created by the lower court's decision in favor of a uniform rule applicable to air carriers operating throughout this country.

III. The Decision Below Raises an Important Question Of Federal Law Which Has Not Been, but Should Be, Settled By This Court.

As noted above, federal courts have authority to enjoin "self-help" in aid of a minor dispute. The RLA, however, does not use, much less define, that term. The Sixth Circuit limited the injunctive power of the district court to "strikes" as defined in the NLRA, 29 U.S.C. § 142(2). *See* App., *infra*, 10a. It held that, while "evidence" of an "interruption to operations," the $3.2 million in economic harm suffered by ABX was not "sufficient" to demonstrate the existence of a "strike" under the NLRA definition because ABX's "regular" business base had not been impaired — that is, there were no "flight interruptions." *Id.* at 13a-14a.[10] Accordingly, the decision in this case raises the important federal question whether the "self-help" enjoinable under Sections 2, First and 204 of the RLA is limited to actual "flight interruptions" or damage to a carrier's "regular" business base.

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10. The lower court provided no support for its constrained reading of the NLRA. Neither did it suggest a standard for determining how much economic harm, if any, would ever be "sufficient" under its test. District courts within the Sixth Circuit are left rudderless in making this important determination.

While the NLRA definition of "strike" includes the "interruption of operations" language of RLA Section 2, First, this Court has never determined what constitutes an "interruption of operations" under the RLA, or explicitly defined the forms of "self-help" that are unlawful and enjoinable under the Act.[11] This is an issue of extreme importance to the Nation's rail and air transportation systems, given the primary objectives of the RLA to "avoid *any* interruption to commerce or to the operation of any carrier engaged therein," and to "provide for the prompt and orderly settlement" of both major and minor disputes. *See* 45 U.S.C. § 151(a) (emphasis added).[12] This question should now be settled by this Court.

The answer to this federal question is particularly significant for two reasons. The first lies in the divergent objectives of the NLRA and RLA. As this Court has recognized, "the major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.' " *See Shore Line*, 396 U.S. at 149 n.13 (quoting *Texas & N.O.R. Co., et al. v. Brotherhood of Ry. and Steamship Clerks, et al.*, 281 U.S. 548, 565 (1930)). The NLRA, on the other hand, expressly protects strikes. *See Division 1287,*

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11. Both *Chicago River* and *Louisville* involved traditional work stoppages. Numerous federal courts have enjoined less traditional forms of self-help under the RLA, including open flying bans. *See, e.g., Delta*, 238 F.3d at 1300 (open flying ban); *National R.R. Passenger Corp. v. American Fed'n of R.R. Police, Inc., et al.*, 613 F. Supp. 602 (D.D.C. 1985) (sick-out and picketing); *Texas Int'l Airlines, Inc. v. Air Line Pilots Ass'n Int'l (ALPA), et al.*, 518 F. Supp. 203 (S.D. Tex. 1981) (mechanical write-up campaign, among other self-help activities).

12. The lower court decision does not address why $3.2 million in economic damages is not "sufficient" evidence of an RLA violation where the statute proscribes "any" interruption to commerce or to the operations of a carrier engaged therein.

Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees, et al. v. Missouri, 374 U.S. 74, 82 (1963) (Section 7 of the NLRA, 29 U.S.C. § 157, explicitly protects strike activity).[13] *See also* ABA Section of Labor and Employment Law, *The Developing Labor Law* 1095 (Patrick Harding ed., 3d ed. 1992) ("The most significant protection of the right to strike . . . is contained in the National Labor Relations Act").

Additionally, Section 2, First's proscription of *any* interruption to a carrier's operations assumes added significance in the airline industry. "Given the tremendous amount of discretion [airline] pilots can exercise in the manner in which they conduct a flight operation," district courts must be able to restrain illegal conduct that is aimed beyond a carrier's "flights" or "regular" business base. *Texas Int'l Airlines, Inc. v. Air Line Pilots Ass'n Int'l*, 513 F. Supp. 203, 213 (S.D. Tex. 1981) (discussing a range of pilot "guerrilla" tactics, including sick calls, refusal to use required navigation systems, excessive fuel usage, and maintenance writeups).

While routinely enjoined in other circuits, such conduct in the Sixth Circuit must now be subjected to the lower court's unprincipled calculus for assessing the "sufficiency" of economic harm to a carrier under a statute that proscribes "any" interruption to its operations. Absent direction from this Court, district courts within the Sixth Circuit will struggle, unsuccessfully, to divine the meaning of the lower court's "sufficiency" test.

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13. Section 7 of the NLRA, 29 U.S.C. § 157, grants employees the right to engage in "concerted activities" for "mutual aid or protection." Such language is conspicuously absent from the RLA. *See Johnson v. Express One Int'l*, 944 F.2d 247, 251 (5th Cir. 1991) (right under NLRA Section 7 (to have co-worker present at investigatory interview) premised on "concerted activities for . . . mutual aid or protection" provision not applicable in RLA context given absence of such language from the Act).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED, DECIDED AND FILED SEPTEMBER 19, 2001

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 99-4499/4540

ABX AIR, INC.,

Plaintiff-Appellee/
Cross-Appellant,

v.

AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL-CIO,

Defendant-Appellant/
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 97-00812 — Sandra S. Beckwith, District Judge.

Argued: May 3, 2001

Decided and Filed: September 19, 2001

Appendix A

Before SILER and GILMAN, Circuit Judges;
DUGGAN, District Judge.*

* * *

OPINION

SILER, Circuit Judge. Defendant, Airline Professionals Association of the International Brotherhood of Teamsters, Local Union No. 1224, AFL-CIO ("Union"), appeals the injunction entered by the district court on behalf of plaintiff, ABX Air, Inc. ("ABX"). The Union argues that the district court lacked subject matter jurisdiction to issue an injunction because its members' concerted refusal to bid for open-flying time did not constitute an impermissible strike in aid of a minor dispute. Rather, it asserts that its members' concerted action was in accord with the collective bargaining agreement ("CBA") and was not a strike action relating to the separate minor dispute over the CBA's three-days-off rule. In its cross-appeal, ABX contends that the district court erred by denying it monetary damages as a remedy for an illegal strike in aid of a minor dispute based on *CSX Transp., Inc. v. Marquar*, 980 F.2d 359 (6th Cir. 1992).

We **AFFIRM** the district court's factual finding that this case involves a minor dispute over the three-days-off rule and **REVERSE** its ruling that the concerted action of the crew members constituted a strike.

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

I. BACKGROUND

ABX, also known as Airborne Express, is a major air freight carrier. In June 1997, ABX and the Union entered into a new CBA. Under Article 13 of the agreement, crew members voluntarily bid for open-flying times, which are scheduled flights that have not been assigned as part of a crew member's monthly schedule, are open because of an employee's absence or an assignment change, or have not been bid upon. Open-flying time is awarded to eligible senior crew members first. If any flights remain, the company assigns junior crew members who are compensated at a higher rate of pay, a practice called junior-manning.

The Union and ABX had a number of unresolved grievances regarding the interpretation of the old and new CBAs. In particular, they disagreed on how to interpret the new three-days-off rule, a provision requiring a minimum of three days off for crew members with any scheduled time-off. Both parties agreed to submit this minor dispute for arbitration in October 1997.[1]

In August 1997, the Union's Executive Board members decided that they would not bid on open-flying time until the Union's disputes and grievances with the company were resolved. The Executive Board announced its decision at a subsequent membership meeting, and a number of attendees stated that they too would not bid for open-flying. Following this, a memorandum from the Executive Board's president and the Union's telephone hotlines focused on the three-days-

1. The parties did not include the arbitrator's decision in the record or their briefs.

off rule dispute and the decision by the board and members to not bid on open-flying time until their problems with ABX were resolved. All hotlines urged members to remain 100 percent united. In response to a letter from ABX stating that the Union's concerted refusal to bid on open-flying time was illegal, one hotline stated that "Your union leadership is not asking you to exercise any illegal job action." Another hotline stated that "Each of us needs to prepare for the long haul should Management continue down the road they have chosen with regard to scheduling."

In September 1997, no Union member bid on open-flying time, and of the 617 open lines available in October, only 13 bids were submitted. Some of those who bid on October flights stated they were harassed by other Union members. ABX claims the Union's self-help action cost it more than $200,000 for the additional junior-manning required. Though it had won prior bids for Christmas season charter contracts, ABX did not compete for a $3 million contract in 1997 based on staffing concerns raised by the open-flying ban.

ABX filed a complaint alleging that the Union and its members boycotted open-flying bidding and that this concerted action constituted an illegal strike in aid of a minor dispute in violation of 45 U.S.C. § 184 (1999). It also asserted that this concerted action violated the Union's mandatory duty under 45 U.S.C. § 152, First (1999) to exert every reasonable effort to resolve its dispute with ABX over the proper interpretation of the three-days-off rule. ABX requested injunctive, declaratory, and monetary remedies.

The district court rejected ABX's initial request for a preliminary injunction, holding that ABX had not shown that

the concerted ban on open-flying had caused an interruption in its operations. In considering Article 13 of the CBA, it stated "by declining to bid for overtime but accepting it when assigned, Defendant's members may exert influence without interrupting Plaintiff's operations and, thus, without engaging in a strike." Therefore, without an interruption in operations, the court ruled that the Union members' action was not a strike, and it had no jurisdiction to issue an injunction. Upon an interlocutory appeal, this court ruled that the injunction request was moot because the bidding ban had ceased, but remanded the case for further consideration of the declaratory and monetary relief issues. *See ABX Air, Inc. v. Airline Prof'l Ass'n of the Int'l Bhd. of Teamsters, Local 1224*, No. 97-4124, 1998 WL 165146 (6th Cir. Apr. 3, 1998).

At the subsequent trial, the court considered the question of whether the actions of the Union and its members constituted an "interruption of operations" at ABX and thus an illegal strike. In its findings of fact, the court found that the Union conceived of and promoted the ban on open-flying, and that its members' concerted action was in aid of the minor dispute over the three-days-off rule, which was subject to arbitration. In defining "strike," the court relied on 29 U.S.C. § 142(2) of the National Labor Relations Act ("NLRA"), which states that the term "strike" includes a "concerted interruption of operations by employees." As a question of first impression and in the absence of authority to the contrary, the court concluded that the definition of "strike" encompasses "concerted activity by employees, promoted and directed by their union, pending resolution of a minor dispute, that disrupts the employer's operations and causes a loss of business or profit with the intention of exerting pressure upon

the employer to change its interpretation of the existing collective bargaining agreement." On this basis, the court held that the Union's activities violated 45 U.S.C. § 184 and § 152, First (1999), and thus it had jurisdiction to enjoin the Union from threatened future action. In addition, the court denied ABX's prayer for money damages based on *CSX Transp., Inc. v. Marquar*, 980 F.2d 359, 382 (6th Cir. 1992).

The Union appeals the district court's ruling on declaratory and injunctive relief, and ABX cross-appeals its denial of monetary damages.[2]

II. STANDARD OF REVIEW

The district court's "factual findings must be upheld unless they are clearly erroneous." *Taylor and Gaskin v. Chris-Craft Indus.*, 732 F.2d 1273, 1277 (1984) (citing Fed. R. Civ. P. 52(a)). As a matter of law, this court reviews *de novo* the district court's statutory construction of the Railway Labor Act ("RLA") regarding the scope of its subject matter jurisdiction. *See United States v. Brown*, 915 F.2d 219, 223 (6th Cir. 1990).

III. DISCUSSION

Under 45 U.S.C. § 181 (1999), all RLA provisions under 45 U.S.C. § 151 *et seq.* apply to air carriers engaged in interstate and foreign commerce and their employees, except § 153 which is replaced by § 184. Section 152, First sets

2. The Union asserts that ABX's notice of cross-appeal failed to properly designate the decision appealed from. Based on Fed. R. App. P. 3, ABX's cross-appeal is valid.

forth two core duties applicable in all disputes between carriers and their employees. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 310-11 (1989) (hereinafter *Conrail*); *Marquar*, 980 F.2d at 368 (citing *Chicago & N.W. Ry. v. United Transp. Union*, 402 U.S. 570, 574 (1971)). First, both parties shall " 'exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions.' " *Marquar*, 980 F.2d at 368 (citation omitted). Second, both parties shall " 'settle all disputes, whether arising out of the application of . . . agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute.' " *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 36 (1957) (hereinafter *Chicago River*) (citation omitted).

Because there is no equivalent of the National Railroad Adjustment Board for the airline industry, 45 U.S.C. § 184 requires every carrier and its employees to establish an adjustment board by agreement. *See Conrail*, 491 U.S. at 304 n.4. If the parties fail to settle disputes "growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" through negotiation, one or both of the parties may petition the adjustment board to resolve it. 45 U.S.C. § 184; *see also Conrail*, 491 U.S. at 304 n.4.

Under the RLA, the Supreme Court distinguishes between major and minor disputes between carriers and employees regarding their CBAs. *See Conrail*, 491 U.S. at 302 (acknowledging the first recognition of this distinction under *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711, 723

(1945)). Major disputes involve disagreements over the creation of contractual rights during bargaining for a CBA or to change the terms of an existing agreement. *See id.*; *Marquar*, 980 F.2d at 361 n.2. Under 45 U.S.C. § 152, Seventh and § 156, the parties must exhaust a lengthy bargaining and mediation process. *See id.* Both are obligated to maintain the status quo during the required process, and the courts can enjoin any status quo violation. *See Conrail*, 491 U.S. at 302-03. If no agreement is reached, the parties may resort to economic force, including strikes. *See id.*; *Marquar*, 980 F.2d at 361 n.2.

Minor disputes include controversies over the meaning or application of an existing CBA provision regarding pay, rules, or working conditions to a specific situation or omitted case. *See Conrail*, 491 U.S. at 303; *Marquar*, 980 F.2d at 361 n.2. If discussions fail to yield a solution, both parties are subject to compulsory and binding arbitration before an adjustment board under 45 U.S.C. § 152, Sixth and § 184. *See id.* While the courts have no jurisdiction to resolve the substance of minor disputes, they can enjoin strikes over minor disputes in order to enforce compliance with the RLA's dispute resolution provisions. *See Conrail*, 491 U.S. at 304; *Chicago River*, 353 U.S. at 41-42; *Marquar*, 980 F.2d at 369.

A. Factual Issue — Minor Dispute over Open Flying or Three-Day Rule

The Union argues that the record does not support the district court's factual findings that this case involves a minor dispute over the CBA's three-days-off rule and that the Union promoted and directed the open-flying ban in aid of this minor

dispute. Rather it argues that this case simply involves a minor dispute over Article 13's open-flying provisions, separate and apart from the three-days-off rule. Based on the Union's interpretation, Article 13 provides crew members with an implicit right to not volunteer for open-flying time, separately or in concert. The Union contends that the district court "ignored the uncontested evidence" that its members voluntarily chose not to bid for open-flying time, without direction from Union officials, based on their dissatisfaction with ABX's slow response to their grievances on several issues. Thus, the Union contests the factual finding that it "conceived of and promoted" a ban on open-flying time bids in aid of its dispute over the three-days-off rule.

Overall, the Union reiterates its characterization of the evidence presented at trial, which was contested by ABX, and fails to demonstrate clear error by the district court. Giving due regard to the court's credibility judgments at trial, we affirm the district court's factual findings and hold that it had subject matter jurisdiction to determine whether the concerted actions of the Union and its members under Article 13 constituted an illegal strike. *See* Fed. R. Civ. P. 52(a).

B. Strike or Minor Dispute

The key question is whether the Union's promotion of a concerted action under the CBA's voluntary open-flying bidding provision constitutes an illegal strike arising from another minor dispute. If there is no strike, there is no subject matter jurisdiction for the issuance of an injunction. *See Conrail*, 491 U.S. at 304; *Chicago River*, 353 U.S. at 41-42; *Marquar*, 980 F.2d at 369.

As the RLA does not define the term "strike," the district court properly looked to 29 U.S.C. § 142(2) for assistance in determining whether the Union's conduct qualified as a "strike" in this "carefully drawn analog[y]" between the NLRA and RLA. *Trans World Airlines, Inc. v. Indep. Fed. of Flight Attendents*, 489 U.S. 426, 432-33 (1989); *see also Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969). In applying the NLRA's definition of "strike," the district court held that its provision regarding "concerted interruptions of operations by employees"[3] includes this case's factual circumstances: "a concerted activity by employees that disrupts the employer's operations and causes a loss of business or profit, promoted and directed by their union, pending resolution of a minor dispute, with the intention of exerting pressure upon the employer to change its interpretation of the existing collective bargaining agreement." While the district court noted cases stating that a concerted refusal to workovertime may constitute a strike, this circuit has not ruled that a concerted refusal to volunteer for overtime, when the work is assigned and willingly performed by others according to the CBA, is a strike.

While the parties' duty to negotiate yields to the adjustment board's authority to resolve minor disputes once they are submitted and no status quo requirement applies to minor disputes, the RLA does not sanction strike actions camouflaged as minor disputes, which threaten to undermine its grievance resolution provisions. *See, e.g.*, *Conrail*, 491 U.S. at 310 (stating that if the employer asserts that the

3. The statute's construction treats concerted interruptions of operations as a different form of concerted action from a work stoppage, slowdown, or strike. *See* 29 U.S.C. § 142(2).

agreement permits it to make a change in working conditions without prior negotiations and the claim is arguably justified by the agreement and not made in bad faith, the employer can make the change); *Marquar*, 980 F.2d at 361 n.2 (stating that an adjustment board has exclusive jurisdiction to resolve minor disputes that the parties cannot resolve). In determining whether the district court properly held that the concerted action of the crew members and Union qualified as a "concerted interruption of operations," three cases provide guidance.

Air Lines Pilots Ass'n v. United Air Lines, Inc., 802 F.2d 886, 905-07 (7th Cir. 1986), and *Texas Int'l Airlines, Inc. v. Air Line Pilots Ass'n*, 518 F. Supp. 203, 208 (S.D. Tex. 1981), dealt with concerted actions taken during CBA negotiations. While the Seventh Circuit in *United Air Lines* stated that the consequences of union conduct short of an outright strike could qualify as a strike, it did not find that the pilots' concerted abuse of sick leave, which arguably increased operational costs, and efforts to discourage business resulted in economic harm sufficient to qualify as a strike. *See id.* at 906-07. Rather, in the absence of any work stoppages, mass demonstrations, or economic harm, the court ruled that the union's actions did not constitute an unlawful strike. *See id.* at 907.

In *Texas Int'l Airlines*, the union directed its pilots to exercise their contractual right to sick leave and the pilots engaged in other concerted actions that resulted in a work slowdown and increased the carrier's operating costs. *See* 518 F. Supp. at 212-14. In issuing an injunction, the district court found that these actions interrupted the carrier's

operations and were intended to pressure the airline to concede to the union's bargaining demands. *See id.* at 212-14, 217.

Finally, the Eleventh Circuit recently ruled in a case where pilots engaged in a concerted refusal to fly overtime during contract negotiations in *Delta Air Lines v. Air Line Pilots Ass'n*, 238 F.3d 1300, 1309 (11th Cir. 2001).The court rejected the union's contention that this was a minor dispute because the CBA "arguably" permitted all pilots to refuse to work overtime. *See id.* at 1307. It stated that such an interpretation defied industry practice to structure flight schedules using open-flying time as part of normal operations. *See id.* at 1307, 1309. The court then found that the pilots' concerted action violated the union's statutory obligation to "exert every reasonable effort to make and maintain agreements" under § 152, First. *See id.* at 1307-09. As a result, the court enjoined the union to take specific steps to stop the no-overtime campaign.

As a threshold matter, a fundamental distinction exists between the above three cases and the case before us now. Each of those cases involved a major dispute, during which a union is required to maintain the status quo. In contrast, the dispute between ABX and the Union is a minor one, during which there is no requirement to maintain the status quo, thus making certain types of concerted action available that would not be during a major dispute. Indeed, we cannot find any case in which a union was held to have violated the RLA during a minor dispute by encouraging its members to refrain from engaging in conduct that is voluntary under a CBA.

Furthermore, the cases relied on by ABX show that a "concerted interruption of operations" requires more than higher operational costs incurred by the necessary exercise of contract provisions and alleged losses from foregone contract opportunities. In contrast to *Texas Int'l Airlines*, the Union members' open-flying ban did not cause a work slowdown. Unlike *Delta Air Lines* where the union argued that the CBA allowed all pilots to refuse to work overtime, here the Union's interpretation of the open-flying provision did not impair ABX's ability to use junior-manning to assign flights.

Rather, this case more closely resembles the facts in *United Air Lines*. While the Union's interpretation of Article 13 denotes an intent to pressure ABX in resolving the three-days-off rule dispute, the resulting concerted conduct is allowed under the CBA. Though higher costs and lost business opportunities can serve as evidence of an interruption of operations, ABX did not suffer sufficient economic harm in this case to show an "interruption of operations." Under the CBA, juniormanning is not the optimal means of assigning flight staff and its use certainly increases costs. However, ABX agreed to this contract provision, utilized it to legally assign crew members to open flights, and did not suffer staffing or flight interruptions. While ABX decided not to compete for certain seasonal contracts in light of the open-flying ban, its regular business base was not impaired. Though the Union's Article 13 interpretation effectively exercises strategic leverage in a minor dispute, ABX's economic injuries do not qualify the crew members' concerted ban on open-flying bidding as a "strike." Therefore, we hold that the district court erred in

determining that this open-flying ban qualified as a "concerted interruption of operations" under the NLRA's definition of "strike."

C. Monetary Damages under *Marquar*

In its cross-appeal, ABX urges this court to overrule *Marquar*, 980 F.2d at 379-82, which prohibits money damages to carriers that suffer economic harm from a union's unlawful strike. It is unnecessary to decide the cross appeal, as we are ruling in favor of the Union. In addition, this panel cannot overrule controlling authority set forth by another panel. *See Salmi v. Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985).

We **AFFIRM** the district court's factual findings, **REVERSE** its decision that there is a "strike" in this case, and **VACATE** its order for injunctive relief on behalf of ABX.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-4499; 99-4540

ABX AIR, INC.,

Plaintiff – Appellee/Cross-Appellant,

v.

AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL-CIO,

Defendant – Appellant/Cross-Appellee.

Before: SILER and GILMAN, Circuit Judges;
DUGGAN, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's factual finding that this case involves a minor dispute over the collective bargaining agreement's three-days-off rule is AFFIRMED; the ruling that the

concerted action of the crew members constituted a strike is REVERSED. IT IS FURTHER ORDERED that the district court's order for injunctive relief on behalf of plaintiff ABX Air, Inc., is VACATED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED NOVEMBER 12, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-97-812

ABX Air, Inc.,

Plaintiff,

vs.

Airline Professional Association of the International Brotherhood of Teamsters, Local Union No. 1224,

Defendant.

Findings of Fact and Conclusions of Law

A. Findings of Fact

The Court makes the following findings of fact on the basis of the evidence submitted at the hearing on Plaintiff's motion for preliminary injunction and the trial of this matter on the merits:

1. Plaintiff is a "carrier" as defined under the Railway Labor Act ("RLA"), 45 U.S.C. §151, *et seq.*

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2. Defendant is the representative of Plaintiff's crew members pursuant to the RLA.

3. In June 1997, ABX and Local Union 1224 entered into a new collective bargaining agreement.

4. Article 13 of the new collective bargaining agreement pertains to scheduling of crew members. That article provides, generally, that crew members will bid for lines of time each month and that lines of time will be awarded to crewmembers in order of seniority. After all crew members are awarded regular lines of time, a number of "open" lines of time will remain on a monthly basis. With regard to those open lines, the collective bargaining agreement provides as follows:

> Open Flying time shall be awarded in accordance with seniority to any crewmember bidding a particular trip, who wishes to pick up additional flying (days and/or hours) on a previously scheduled work day, or day off. Open Flying shall not be awarded if it makes the crewmember illegal, for a preceding or following trip, or violates the provisions of Section P. of this Article.
>
> * * *
>
> In the event regular lineholders do not bid the equivalent of one (1) day per Regular Line of Time as shown on the Bid Master Crew Schedule [i.e. sixty (60) days bid when there are sixty (60) regular lines of time on the Bid Master Crew

> Schedule], the Company may assign open flying time . . . . Open flying shall be assigned in reverse order of seniority at one day per Regular Line of Time to no more than the bottom seventy-five percent (75%) of the lineholders holding Regular Lines of Time as shown on the Bid Master Crew Schedule. If assigning one (1) day per Regular Line of Time to no more than the bottom seventy five percent (75%) of the Regular Lines of Time does not meet the requirement above, one (1) additional day may be assigned, in reverse order of seniority, to no more than the bottom fifty percent (50%) of the line holders holding Regular Lines of Time as shown on the Bid Master Crew Schedule.

Article 13, Section E.

5. Hourly compensation to crewmembers increases, under the collective bargaining agreement, as years of service increase.

6. When a crewmember flies open lines of time by Company assignment, rather than voluntarily, that crewmember is compensated for the flight time and is paid a premium of an additional two and one-half hours pursuant to Article 19, Section E.4 of the collective bargaining agreement.

7. After the parties entered into the new collective bargaining agreement, a number of grievances arose concerning the interpretation of that agreement.

8. One such grievance related to the interpretation of the provision of the collective bargaining agreement that provides for consecutive days during which Plaintiff may not schedule a crewmember. The arbitration of that grievance occurred on October 3, 1997. The record in this matter does not disclose whether the arbitrator's decision concerning that grievance has been issued. The parties agree that the dispute underlying that grievance was a "minor dispute".[1]

9. When Plaintiff filed its complaint in this matter, Defendant's members were uniformly declining to bid on open lines of time. Accordingly, Plaintiff employed the contractual mechanism for assigning "open" lines of time in reverse order of seniority.

10. The actions of Defendant's members were concerted and were directed and promoted by Defendant's Executive Board. The Executive Board made its intention to orchestrate a concerted campaign clear by issuing tacit orders at a membership meeting on August 5, 1997; in a memorandum from the President of the Executive Board to all members dated August 7, 1997; and in a telephone hotline message recorded on August 20, 1997 and accessible by all members. The collective import of those three communications, among others, was that Defendant's members were not to bid on open lines of time.

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1. "Minor" disputes under the Railway Labor Act are disputes over the interpretation and application of existing collective bargaining agreements between carriers and unions, while "major" disputes are disputes over proposals to change such agreements. *See Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 722-25 (1945).

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11. That tacit but clear order was repeated in response to an August 29, 1997 letter from Plaintiff's Senior Vice President of Flight Operations to all of Defendant's members. In that letter, Bob Morgenfeld advised Defendant's members that their concerted refusal to bid on open lines of time was illegal. In his response to Mr. Morgenfeld's letter, Rick Ziebarth, Defendant's President, recorded a telephone hotline message, accessible by all of Defendant's members, in which he refuted Mr. Morgenfeld's insinuation that Defendant's members' actions were illegal. Mr. Ziebarth then stated the following: "Your union leadership is not asking you to exercise any illegal job action." While Defendant denies that the implication of that communication was that Defendant was coordinating the open-flying ban, the Court finds that communication to be persuasive evidence, when considered together with the other evidence of communications from Defendant to its members during the same time period, that Defendant conceived of and promoted the ban.

12. Further evidence in support of the Court's finding is found in another hotline message, dated September 6, 1997, in which Defendant advised its members as follows: "Each of us needs to prepare for the long haul should Management continue down the road that they have chosen with regard to scheduling." The import of that message was that Defendant's leadership expected all members to refrain from bidding on open lines of flight for as long as Plaintiff refused to adopt the interpretation of the collective bargaining agreement urged by Defendant.

13. Defendant's ban on open-flying was successful in that none of Defendant's members bid on open lines of flight

for the month of September 1997. Of the 617 open lines in October, Defendant's members bid on only 13. Those members who bid on open lines for October were subjected to harassment by other members, which was not discouraged by Defendant's officials when they learned of it.

14. Defendant's actions cost Plaintiff more than $200,000 in the form of increased compensation to crew members who staffed the open lines of flight on which Defendant's members did not bid.

15. Plaintiff was able to assign the "open" lines pursuant to the contract by a procedure known generally as "junior-manning." Plaintiff concedes that the concerted action of Defendant's members did not result in a canceled flight or a stoppage of Plaintiff's operations, with the exception of certain Christmas season charter contracts.

16. Defendant's members' actions caused Plaintiff to decline to bid for charter contract business during the 1997 Christmas season. Plaintiff reasonably concluded that it would not be able to staff the charter flights if Defendant continued to promote a ban on open-flying by its members. Plaintiff had successfully bid for that charter business in the past. The Court is persuaded that the loss caused by Plaintiff's declining to bid on the Christmas season charter business was in excess of $3,000,000 and that Defendant's ban on open-flying was the cause of that loss.

17. Plaintiff initiated this action seeking declaratory judgment and damages. Plaintiff alleges that Defendant violated 45 U.S.C. §184, §204 of the RLA, by engaging in a

strike pending the resolution of a minor dispute. Plaintiff also alleges that Defendant violated §2 First of the RLA by failing to

> exert every reasonable effort to make and maintain contracts concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such contracts or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

18. Defendant's actions in promoting and directing the ban on open-flying by its members was in aid of the minor dispute over scheduling that was a subject of arbitration between the parties.

19. Defendant has threatened to repeat its actions of late 1997.

B. Conclusions of Law

1. The Railway Labor Act does not define the term "strike." The definition included in the National Labor Relations Act at 29 U.S.C. §142(2) applies.[2] There, "strike" is defined, in somewhat circular fashion, as follows:

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2. The Supreme Court has held that, when interpreting the Railway Labor Act, courts may properly look to provisions of the National Labor Relations Act that are not inconsistent. *See Pittsburgh & Lake Erie R. Co. v. Railway Executives*, 491 U.S. 490 (1989); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

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> The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

2. A concerted refusal to work overtime may constitute a strike. *See, e.g., Elevator Manufacturers' Association of New York, Inc. v. Local 1, International Union of Elevator Constructors*, 689 F.2d 382, 386 (2d Cir. 1982); *American Shipbuilding Co. v. Local Union 358*, 459 F. Supp. 491, 493 (N.D. Ohio 1978). In each of those cases, the employees had engaged in a concerted refusal to *perform* overtime work. In none of the reported cases, however, has a court concluded that a concerted refusal to *volunteer* for overtime is a strike, when the employer may assign the overtime work to employees pursuant to a provision of the applicable collective bargaining agreement and the employees accept the overtime work thus assigned.

3. Because the applicable definition of the term "strike" includes the word "strike", the term encompasses more than the traditional strike with attendant work stoppage and picketing. *See Sheet Metal Workers' International Association AFL-CIO v. National Labor Relations Board*, 989 F.2d 515, 520 (D.C. Cir. 1993). Indeed, the courts have interpreted the term to include a number of lesser concerted actions. *See, e.g., Elevator Manufacturers' Association* and *American Shipbuilding Co., supra*. No court has considered, in a reported decision, actions like those of Defendant's members in late 1997 in conjunction with the applicable definition of the term "strike".

4. The second phrase of that definition brings stoppages of work that fall short of the traditional strike within the scope of activities covered by the term "strike".

5. The actions of Defendant's members in late 1997, promoted and directed by Defendant, did not constitute a slowdown.

6. Those concerted actions constituted an interruption of operations by employees; therefore, Defendant's actions constituted a strike. *See Texas International Airlines, Inc. v. Air Line Pilots Association International*, 518 F. Supp. 203, 212 (S.D. Texas 1981) (actions by employees to intentionally delay operations may constitute a strike where the employees' actions are designed to exert pressure on the employer).

7. In the absence of authority to the contrary, the Court concludes that the applicable definition of the term "strike" includes concerted activity by employees, promoted and directed by their union, pending resolution of a minor dispute, that disrupts the employer's operations and causes a loss of business or profit with the intention of exerting pressure upon the employer to change its interpretation of the existing collective bargaining agreement.

8. Such activity violates the union's duty, under §2 First of the RLA to "settle all disputes . . . in order to avoid any interruption to commerce." *See Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 310 (1989).

9. Defendant's activities also violated the requirements of 45 U.S.C. §184 concerning the resolution of minor disputes.

10. Money damages are not available as a remedy for an illegal strike in support of a minor dispute. *See CSX Transportation, Inc. v. Marquar*, 980 F.2d 359, 382 (6th Cir. 1992).

11. This Court is empowered to enjoin strikes in violation of the RLA. *See Marquar*, 980 F.2d at 380. Because Defendant has threatened to repeat its actions of late 1997, the threat of future harm exists. *See United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). Because Plaintiff is not entitled to damages, it has no adequate remedy at law for Defendant's violations of the RLA. Accordingly, Plaintiff is entitled to declaratory and injunctive relief. *See Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992).

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT

1. The refusal of Defendant's members to bid on open lines of flight in August and September 1997, promoted and directed by Defendant through its Executive Board, constituted an illegal strike in aid of a minor dispute in violation of Sections 2 First and 204 of the RLA, 45 U.S.C. §§2 First and 184.

2. Defendant, through its officers, agents, representatives, employees, and members, and all persons acting by, in concert with, through, or under them or each of them are permanently

restrained and enjoined from, either directly or indirectly by any means, method, or device whatsoever, authorizing, encouraging, causing, engaging in, approving of, commencing, sanctioning, or assisting in a concerted refusal by Defendant's members to bid on open lines of flight in aid of a minor dispute as contemplated by the RLA.

3. The motion by the *amicus curiae* Independent Pilots Association to file a brief (Doc. 65) is **GRANTED**.

4. This action is **CLOSED**.

s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-97-812

ABX Air, Inc.,

Plaintiff,

vs.

Airline Professional Association of the International Brotherhood of Teamsters, Local Union No. 1224,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT THE REFUSAL OF DEFENDANT'S MEMBERS TO BID ON OPEN LINES OF FLIGHT IN AUGUST AND SEPTEMBER 1997 CONSTITUTED AN ILLEGAL STRIKE IN AID OF A MINOR DISPUTE.

DEFENDANT, THROUGH ITS OFFICERS, AGENTS, REPRESENTATIVES, EMPLOYEES, AND MEMBERS,

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AND ALL PERSONS ACTING BY, IN CONCERT WITH, THROUGH, OR UNDER THEM OR EACH OF THEM ARE PERMANENTLY RESTRAINED AND ENJOINED FROM EITHER DIRECTLY OR INDIRECTLY BY ANY MEANS, METHOD, OR DEVICE WHATSOEVER, AUTHORIZING, ENCOURAGING, CAUSING, ENGAGING IN, APPROVING OF, COMMENCING, SANCTIONING, OR ASSISTING IN A CONCERTED REFUSAL BY DEFENDANT'S MEMBERS TO BID ON OPEN LINES OF FLIGHT IN AID OF A MINOR DISPUTE AS CONTEMPLATED BY THE RLA PURSUANT TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THIS COURT [DOC. 77].

November 12, 1999

Kenneth Murphy, Clerk
Deputy Clerk

s/ Tempann Thomas

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED APRIL 3, 1998

No. 97-4124

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABX AIR, INC.,

Plaintiff-Appellant

v.

AIRLINE PROFESSIONAL ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: MERRITT and CLAY, Circuit Judges; and BELL, District Judge[1]

PER CURIAM. The plaintiff, ABX Air, Inc., an air express carrier, appeals according to its Notice of Appeal "from the order of Judge Sandra S. Beckwith, entered in the

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1. The Honorable Robert Holmes Bell, Judge of the United States District Court for the Western District of Michigan, sitting by designation.

within cause on Tuesday, September 30, 1997, denying ABX Air, Inc.'s motion for preliminary injunction." This appeal is taken pursuant to 28 U.S.C. § 1292(a) allowing interlocutory appeals from the granting or denying of a preliminary injunction. The parties advised the court at oral argument on March 17, 1998, that the conduct of the defendant for which the preliminary injunction was sought had ceased. ABX argued, however, that the court should rule upon the merits of the case because the underlying issue requiring an interpretation of the Railway Labor Act is "capable of repetition but evades review," an exception to the mootness doctrine.

The complaint filed by ABX in the District Court seeks a declaratory judgment and damages in paragraphs (2) and (3) of the prayer for relief. These prayers for relief are in addition to the prayer for a preliminary injunction contained in paragraph (1) of the relief requested.

The District Court in its opinion and order purported to rule only upon the request for preliminary injunction, and the Notice of appeal purported to seek review only of the denial of the preliminary injunction.

In light of the narrow preliminary injunction issue presented to this court and the fact that the parties agree that the conduct in question has now ceased, the case no longer presents a live question on the need for an injunction. Hence on this issue the case or controversy requirement of the Constitution is not met and the case is moot.

On the "capable of repetition but evading review" point, we would point out that this is an interlocutory appeal on the

injunction matter and that the declaratory judgment issue and the damages issue remain in the District Court at the present time as unresolved issues. In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), the Supreme Court held in a similar situation that the issue on the injunction after the conduct in question has ceased was now moot but that the issues on the declaratory judgment issue which remained in the case were not moot. The Court of Appeals in that case had not recognized or separated the injunctive issue from the declaratory issue, and hence the Supreme Court reversed the Court of Appeals' holding that the entire case was moot and sent the case back for consideration of the declaratory judgment issue. Likewise in this case, having decided that the injunctive issue is moot, we remand the case to the District Court for further consideration of the remaining issues under the authority of the *McCorkle* case.

Accordingly, it is so ORDERED.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED SEPTEMBER 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-97-812

ABX Air, Inc.,

Plaintiff,

vs.

Airline Professional Association of the International Brotherhood of Teamsters, Local Union No. 1224,

Defendant.

MEMORANDUM AND ORDER

Plaintiff ABX Air, Inc. (the "Company") initiated this action by filing a complaint on September 10, 1997. Plaintiff alleges that members of Defendant Local Union No. 1224 have refused to volunteer for overtime, thus effectuating a strike or slowdown, which has resulted in increased costs to Plaintiff. On September 17, 1997, Plaintiff moved for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. This matter is now before the Court upon that motion.

Appendix D

1. *Background*

In June 1997, ABX and Local Union 1224 entered into a new collective bargaining agreement. At that time, a number of grievances related to interpretations of the previous collective bargaining agreement were unresolved. Article 13 of the new collective bargaining agreement pertains to scheduling of crew members. That article provides, generally, that crew members will bid for lines of time each month and that lines of time will be awarded in order of seniority. After all crew members are awarded regular lines of time, a number of "open" lines of time will remain on a monthly basis. With regard to those open lines, the collective bargaining agreement provides as follows:

> 3. Open Flying time shall be awarded in accordance with seniority to any crewmember bidding a particular trip, who wishes to pick up additional flying (days and/or hours) on a previously scheduled work day, or day off. Open Flying shall not be awarded if it makes the crewmember illegal, for a preceding or following trip, or violates the provisions of Section P. of this Article.
>
> 4. In the event regular lineholders do not bid the equivalent of one (1) day per Regular Line of Time as shown on the Bid Master Crew Schedule [i.e. sixty (60) days bid when there are sixty (60) regular lines of time on the Bid Master Crew Schedule], the Company may assign open flying time . . . . open flying shall

be assigned in reverse order of seniority at one day per Regular Line of Time to no more than the bottom seventy-five percent (75%) of the lineholders holding Regular Lines of Time as shown on the Bid Master Crew Schedule. If assigning one (1) day per Regular Line of Time to no more than the bottom seventy five percent (75%) of the Regular Lines of Time does not meet the requirement above, one (1) additional day may be assigned, in reverse order of seniority, to no more than the bottom fifty percent (50%) of the line holders holding Regular Lines of Time as shown on the Bid Master Crew Schedule.

Article 13, Section E.

Hourly compensation to crewmembers increases, under the collective bargaining, as years of service increase. When a crewmember flies open lines of time by Company assignment, rather than voluntarily, that crewmember is compensated for the flight time and is paid a premium of an additional two and one-half hours, pursuant to Article 19, Section E.4 of the collective bargaining agreement.

After the parties entered into the new collective bargaining agreement, a number of grievances arose concerning the interpretation of that agreement. Most or all of those grievances remain unresolved, as do several grievances related to the previous collective bargaining agreement. One grievance related to the interpretation of the current collective bargaining agreement is scheduled for expedited arbitration on October 3, 1997.

Appendix D

Many of Defendant's members are unhappy with the speed with which grievances related to the interpretation of the new collective bargaining agreement are being resolved. Those members, with some encouragement from the leadership of Local Union 1224, have engaged in the concerted action of declining to bid on open lines of time for the months of September and October. Accordingly, Plaintiff has employed the contractual mechanism for assigning "open" lines of time in reverse order of seniority. Evidence submitted by Plaintiff suggests that the company has paid approximately $198,000 during the month of September in two and one-half hour premium pay, pursuant to Article 19, Section E.4 of the collective bargaining agreement.

The parties agree that, since Defendant's members began unanimously declining to bid on "open" lines of time, the Company has been able to assign the "open" lines pursuant to the contractual provision, known generally as "junior-manning." The Company concedes that the concerted action of the union members has not resulted in a canceled flight or an interruption of Plaintiff's operations. The evidence unequivocally supports Defendant's contention that it does not intend to interrupt Plaintiff's service to its customers by virtue of its members' concerted action and that members will continue to permit the Company to junior-man them on open flights.

Plaintiff contends that Defendant's action is an illegal strike or slowdown and that this Court may properly exercise jurisdiction to enjoin Defendant's members' concerted action. Defendant denies that the concerted action in this case constitutes an illegal strike or slowdown and that this Court

has jurisdiction. Accordingly, as a threshold matter, the Court must determine whether it may properly exercise jurisdiction in this matter.

2. *Analysis*

At least for the purposes of Plaintiff's motion for a preliminary injunction, the parties agree that the pending grievances, including the grievance that is scheduled for arbitration on October 3, 1997, are minor disputes. *See, e.g., Consolidated Rail Corp. v. Railway Labor Executives' Association*, 491 U.S. 299, 303 (1989). "Courts may enjoin strikes arising out of minor disputes." *Id.* at 304 (citing *Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30 (1957)). The parties also agree that the concerted action of Defendant's members is not a traditional strike in the sense that the crewmembers have not walked off their jobs and refused to perform services for the Company. Plaintiff contends that the action is, nevertheless, a strike as the term is defined under federal law.

In the National Labor Relations Act [1], 29 U.S.C. §142(2), "strike" is defined as a concerted stoppage of work or concerted slowdown or other concerted interruption of operations by employees. The United States Supreme Court has held that, when interpreting the Railway Labor Act, courts should look to the National Labor Relations Act. *See, e.g., Pittsburgh & Lake Erie R. Co. v. Railway Executives*, 491 U.S. 490 (1989); *Brotherhood of Railroad Trainmen v.*

1. The Railway Labor Act, 45 U.S.C. §§151-188, which governs labor relations in the airline industry, does not define the term, "strike."

Jacksonville Terminal Co., 394 U.S. 369 (1969). Accordingly, the Court concludes that a concerted slowdown or other concerted interruption of the employer's operations may constitute a strike under the Railway Labor Act. This Court could properly exercise jurisdiction to enjoin such an action.

In various reported cases, the federal courts have recognized that a concerted refusal to work overtime may constitute a strike. *See, e.g., Elevator Manufacturers' Association of New York Inc. v. Local 1, International Union of Elevator Constructors*, 689 F.2d 382, 386 (2d Cir. 1982); *American Shipbuilding Co. v. Local Union 358*, 459 F. Supp. 491, 493 (N.D. Ohio 1978). In each of those cases, the employees have engaged in concerted refusal to *perform* overtime work. In none of those reported cases, however, has a court concluded that a concerted refusal to *volunteer* for overtime is a strike, when the employer may assign the overtime work to employees pursuant to a provision of the applicable collective bargaining agreement and the employees accept the overtime work thus assigned.

Plaintiff assigns particular significance to a 1993 decision of another judge of this Court. *See ABX Air, Inc. v. International Brotherhood of Teamsters, Airline Division, Local Union No. 957*, Case No. C-3-91-327 (S.D. Ohio July 23, 1993). In a dispute between Plaintiff and the union representing its flight crew employees, Judge Rice concluded that he could properly exercise jurisdiction to enjoin a strike. In that decision, the court made no mention of the existence of a provision in the collective bargaining agreement whereby the Company could assign overtime work to crewmembers in the event that crewmembers did not bid for some or all of

the open lines. Indeed, the decision speaks only of a refusal to bid for overtime. The Court cannot determine, therefore, whether crewmembers were accepting assigned overtime or, indeed, whether Plaintiff could assign it under the then-effective collective bargaining agreement. The Court cannot conclude, therefore, that that situation is analogous to the one presented in this action.

Moreover, in the earlier action, Judge Rice did not find that the crewmembers had engaged in a strike. Rather, in the context of a motion to dismiss, he accepted as true Plaintiff's allegation that the crewmembers had engaged in a strike and held that the court had jurisdiction to enjoin a strike. He, accordingly, denied, the motion to dismiss. His decision does not constitute authority for the position that Defendant's members are presently engaging in a strike.

In the absence of authority for Plaintiff's proposition that Defendant's members' concerted activity is a strike, the Court turns to the definition of the term, "strike," to resolve the issue. If a strike is a concerted stoppage of work or concerted slowdown or other concerted interruption of operations by employees, one element must be present in order for a concerted action to be deemed a strike. The concerted action must effect an interruption of the employer's operations. Because that element is absent in the present case, the Court finds that Defendant's members' action is not a strike. This Court may not, therefore, properly exercise jurisdiction to enjoin the action.

The evidence of record unequivocally establishes that Defendant's members' concerted action has not interrupted

Plaintiff's operations and does not threaten to interrupt those operations. Indeed, on more than one occasion during the hearing on Plaintiff's motion, Plaintiff's counsel conceded that Plaintiff's operations had not been interrupted. The evidence establishes that Defendant's president warned members not to "park" any planes. The Court finds that Defendant did not and does not intend to interrupt the service that Plaintiff offers to its customers.

The definition of the term, "strike," provided by the National Labor Relations Act encompasses most forms of economic self-help in which employees may engage to influence the decision-making of the employer. Those forms of self-help are subject to injunction. The unusual provisions of the parties' collective bargaining agreement give rise to another form of self-help, however, that does not constitute a strike.

Defendant's members may decline to volunteer for overtime work without interrupting Plaintiff's operations because of the collective bargaining agreement's provision for the assignment of overtime via junior-manning. Accordingly, by declining to bid for overtime but accepting it when assigned, Defendant's members may exert influence without interrupting Plaintiff's operations and, thus, without engaging in a strike.[2] The Court is without jurisdiction to enjoin such action.

---

2. Plaintiff characterizes Defendant's members' action as economic self-help. The court is not convinced that the self-help is economic in nature, however. The evidence submitted by Plaintiff for the purpose of establishing that Defendant's members' action

(Cont'd)

Appendix D

3. *Conclusion*

For the foregoing reasons, Plaintiff's motion for a preliminary injunction (Doc. 7) is hereby **DENIED**. Plaintiff's request for a status conference (Doc. 8) is **MOOT**.

IT IS SO ORDERED.

s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

(Cont'd)
raises Plaintiff's cost of doing business is inconclusive, and the Court finds that Plaintiff has not proved that its costs have increased.

Plaintiff's evidence concerning the impact of Defendant's members' concerted action on its costs reflects only the amount paid in two and one-half hour premium pay. The Court assumes that some or all of that cost is offset by the reduced hourly rates of pay of the crewmembers performing the overtime work, inasmuch as overtime is assigned in reverse order of seniority. Plaintiff's evidence makes no accounting for the difference in the hourly rates of pay of the crewmembers performing overtime work before the concerted action as compared to those performing the work presently. Accordingly, that evidence would not support a finding that Defendant's members' action has had a negative impact on Plaintiff's costs of doing business. For the same reason, the Court would not award injunctive relief, even if the Court were to conclude that Defendant's members' action is a strike.

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-914

IN THE

Supreme Court of the United States

ABX AIR, INC.,

Petitioner,

v.

AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit properly concluded that flight crew members' exercise of a contractual right not to volunteer for extra assignments, even if done in concert, does not constitute a strike where all flights are assigned and flown in accordance with the collective bargaining agreement and, thus, where there are no flights canceled or delayed and no interruption of the carrier's operations.

2. Whether the Sixth Circuit properly held that this case presents a minor dispute that does not implicate the status quo requirements of the Railway Labor Act and that is within the exclusive jurisdiction of a System Board of Adjustment and not of the courts.

3. Whether the Sixth Circuit's decision is consistent with, or distinguishable from, this Court's precedent and decisions from other circuits.

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STATEMENT OF THE CASE

Despite the Petitioner's rather overwrought assertions about the state of the air transportation industry and the potential effects of the Sixth Circuit's decision on the dispute resolution processes of the Railway Labor Act, this case actually presents a very limited and fact-specific dispute under the parties' collective bargaining agreement. The contract at issue is between ABX Air, Inc. ("ABX" or "the Company"), a cargo carrier engaged mainly in the overnight delivery of small packages, and the union representing its pilots and professional flight engineers (referred to, collectively, as "crewmembers"), the Airline Professionals Association of the International Brotherhood of Teamsters, Local Union No. 1224 ("Local 1224" or "the Union"). The dispute concerns the contractual rights of the crewmembers to decline to bid for voluntary extra assignments and whether a concerted exercise of that choice can constitute a strike, where the employer uses contractual mechanisms to staff all flights and where not a single flight is cancelled or even delayed.

The case involves voluntary bidding for "open flying," flights in ABX's schedule that have not been bid upon and assigned to crewmembers as part of initial monthly work schedules or that have become open because of a crewmember's absence, an assignment change or otherwise. Under the collective bargaining agreement, open flying is first assigned to crewmembers who require additional flights to meet their minimum monthly hours under the contract or to make up days of work lost for some reason. Contract, Preliminary Injunction Hearing Jt. Ex. 1, Article 13, Section E1.-2., Appendix 1a. Any trips that still remain open then "shall be awarded in accordance with seniority to any

crewmember bidding a particular trip *who wishes to pick up additional flying* (days and/or hours) on a previously scheduled work day, or day off." (Emphasis added.) *Id.* Section E.3, Appendix 2a.

Representatives of both parties testified it is voluntary and discretionary for an individual employee to volunteer for open flying assignments; some frequently bid for open flying, while others do so only rarely. The contract sets no limitations on the crewmembers' discretion in this respect; they do not need a good reason, or even any reason at all, not to volunteer for open flying. It makes no difference under the contract whether the crewmember declines to bid because he or she is angry at the Company, wishes to make common cause with his or her fellow crewmembers or simply wants to preserve leisure or family time. The number of flights bid through open flying varies dramatically both from month to month and from crewmember to crewmember. No crewmember has ever been disciplined for failing to bid for open flying. Preliminary Injunction Hearing Transcript (hereinafter "Hearing Tr.") 38-40, 53-54, 104, 127, 132-33, 156, 168-69, 174, 298-300, 318.

The parties negotiated for two separate, contractual means of assigning open trips when there is an insufficient level of voluntary bidding to cover ABX's crewmember requirements. First, if the regular line holders (that is, crewmembers other than reserve pilots) as a group do not bid the equivalent of one open trip each, the Company may assign the open trips in reverse seniority order, at one trip each, to those crewmembers in the bottom 75 percent of the seniority list. If the specified number of open trips still are not filled, ABX may assign a second open trip each to crewmembers in the bottom 50 percent of the list.

The compensation for employees assigned through the "bottom 75-bottom 50" method is the same as if they had bid for the trips voluntarily. Second, ABX may make assignments to crewmembers in reverse seniority order, a process referred to as "junior manning." Crewmembers given an additional assignment through junior manning receive a premium in the amount of 2.5 hours of pay beyond the nc mal pay for the trip; however, some of that premium is offset by the fact that more junior — and therefore lower paid — crewmembers are subject to these assignments. Contract, Article 13, Sections E.3, E.4, L & N.7; Appendix at 2a-4a.

All of these scheduling and assignment provisions are contained in the contract between the parties that was executed on June 25, 1997. It is undisputed that, almost immediately after agreement was reached on this contract, there arose a number of disputes about the proper interpretation and application of various provisions, many but not all of which related to crew scheduling. Other grievances remained from the period of the prior collective bargaining agreement. Although the District Court concluded that the main point of contention related to a scheduling rule requiring three consecutive days off, and the Sixth Circuit refused to disturb that finding as not clearly erroneous, this was just one of many pending disputes between the parties. *See* District Court's Findings of Fact and Conclusions of Law, Nov. 12, 1999 (hereinafter "Findings & Conclusions"), Cert. Petition App. at 19a-20a;[1] Opinion of the Sixth Circuit (hereinafter "Appellate Opinion"), Cert. Petition App. at 3a, 8a-9a.

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1. The lower courts' decisions are reproduced in the appendix to the Petition for a Writ of Certiorari and will be cited to here as "Cert. Petition App. at __."

By August 1997, many crewmembers had become unhappy with the pace at which the various grievances were being addressed, by both the Company and the Union, and with the expense to the Union of paying its officers — all of whom are full-time ABX crewmembers — when they must miss scheduled work in order to conduct Union business. At a Union meeting in August, the Union's President announced that he and other members of the Executive Board had determined not to bid open flying so they could devote more time to resolving the pending issues. The crewmembers present at the meeting applauded this decision by the Executive Board; without prompting from any Union officers, a number of them indicated they also would prefer not to bid open flying. The parties disputed the level of encouragement the Union later offered; Local 1224's President at one point did refer to the Union officers' voluntary participation in a "membership-driven open flying ban." Hearing Tr. 97-98, 106-07, 119, 123-27, 131-32, 136-37, 144-52, 169, 171.

There was no voluntary bidding for open flying in September 1997 and relatively little in October. However, all flights were covered by the Company's reserve crewmembers and through the contractual means for assigning the trips. There was no evidence of a single crewmember refusing to accept a bottom 75 — bottom 50 or junior manning assignment. Not one plane was grounded and not one flight was cancelled or even delayed because of the crewmembers' decisions not to volunteer for the extra assignments. Open flying bidding in a more normal pattern resumed by December. District Court Memorandum & Order, Oct. 1, 1997, at 3, 7-8; Findings & Conclusions, Cert. Petition App. at 21a-22a.

At most, ABX estimated that covering flights through the alternative means rather than through voluntary bidding cost it $200,000 for the two months involved. Findings & Conclusions, Cert. Petition App. at 22a. However, this figure must be considered in the context of the Company's overall expenses and revenues, the latter of which ABX's Chief Executive Officer testified was $10 million *per day*. Trial Transcript, Aug. 3, 1999, at 93. ABX also alleged it had "lost" $3 million when it declined to bid for certain Christmas-season mail charter business; this was extra work, outside of its normal operations, that the Company had bid for and performed on occasion in the past. ABX asserted that it did not try to compete for this work in 1997 because it conjectured that crewmembers might not be available to fly the trips. However, the appellate court noted that this work was outside the Company's "regular business base," which was not impaired by the open flying action. Cert. Petition App. at 4a, 13a.

As required by the Railway Labor Act ("RLA"), the parties' collective bargaining agreement establishes a grievance procedure that culminates in a hearing before the Arbitration System Board of Adjustment, chaired by a neutral, third party arbitrator. Contract, Article 16. Both the Company and the Union are empowered to bring a grievance or dispute to the adjustment board, but ABX did not file a grievance over the open flying issue. Instead, it filed a lawsuit seeking injunctive and other relief in the United States District Court for the Southern District of Ohio. After an evidentiary hearing on ABX's motion for preliminary injunction, the court initially ruled that the open flying ban had not interrupted the Company's operations and that the court had no jurisdiction to enjoin the crewmembers' actions. Memorandum and Order, Oct. 1, 1997. However, after

briefing on motions for summary judgment and further testimony at trial, the District Court essentially reversed itself. It held that "the applicable definition of the term 'strike' includes concerted activity by employees, pending resolution of a minor dispute, that disrupts the employer's operations and *causes a loss of business or profit* with the intention of exerting pressure upon the employer to change its interpretation of the existing collective bargaining agreement." Order, April 9, 1999, at 15-16 (emphasis added). Applying this definition, the District Court held that the crewmembers' activity did not constitute a "slowdown" but did create an "interruption of operations" and thus a "strike;" it enjoined such action in the future. Findings & Conclusions, Cert. Petition App. at 25a-27a.

On appeal, the Sixth Circuit reversed the judgment of the District Court. It held that, for a concerted action to amount to a strike or "a 'concerted interruption of operations' requires more than higher operational costs incurred by the necessary exercise of contract provisions and alleged losses from foregone contract opportunities." Appellate Opinion, Cert. Petition App. at 13a. Because the Company used contractually agreed processes "to legally assign crew members to open flights, and did not suffer staffing or flight interruptions . . . ABX's economic injuries do not qualify the crew members' concerted ban on open-flying bidding as a 'strike'" as defined by the RLA. *Id.* at 13a-14a. ABX is seeking review of that conclusion in this Court.

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT THE CREWMEMBERS' EXERCISE OF A CONTRACTUAL RIGHT NOT TO VOLUNTEER FOR EXTRA ASSIGNMENTS DID NOT CONSTITUTE A STRIKE WHERE ALL FLIGHTS WERE ASSIGNED AND FLOWN IN ACCORDANCE WITH THE PARTIES' CONTRACT AND WHERE THERE WERE NO CANCELED OR DELAYED FLIGHTS AND NO INTERRUPTION IN THE CARRIER'S OPERATIONS.

The issue before the Sixth Circuit was whether, under the parties' contract and under all of the factual circumstances, the crewmembers' refusal simply to *volunteer* for open flying assignments, without refusing to *perform* them, constituted a "strike" within the meaning of the Railway Labor Act that was within the federal courts' jurisdiction to enjoin. It correctly ruled that the activity here did not rise to the level of a strike, which it defined as a work stoppage or an "interruption of operations." The Petitioner urges this Court to overrule that finding, pressing an interpretation of the term "strike" that is inconsistent both with any statutory or case-law definition and with common sense.

The RLA does not define the word "strike," and both the District Court and the Sixth Circuit looked for guidance to the definition in the National Labor Relations Act, 29 U.S.C. § 142(2), which includes a "concerted interruption of operations by employees." Leaving aside the question of whether the NLRA definition can be analogized to the quite different statutory scheme of the RLA, at a minimum the concept of an "interruption" should mean an interruption in

a carrier's transportation services, not some mere additional expense or inconvenience to the carrier.

The RLA was designed to protect the provision of transportation and shipping services to the public, not to protect the profits of an individual carrier.

> The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to insure to the public continuity and efficiency of interstate transportation service, and *to protect the public from injuries and losses* consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies. H.R. Rep. No. 328, 69th Cong., 1st Sess. p. 1.

Union Pac. R.R. v. Price, 360 U.S. 601, 609 (1959) (emphasis added). The RLA's controlling theme — "to avoid any interruption to commerce or to the operation of any carrier engaged therein" — is recited in the language of the statute itself, 45 U.S.C. § 151a(1), and appears many times throughout its legislative history. Congress was concerned with the interests of the public, including those of travelers and shippers, if the trains did not run. *See, e.g.*, Legislative History of the RLA 217 (ABA Section on Labor and Employment Law, 1988) (Representative Barkley) (declaring that the public's interest in "the continuous and uninterrupted transportation of the necessaries of life and of industry" formed the basis for Congressional and court action regarding the settlement of railroad labor disputes). *See also, e.g.*, *Consolidated Rail Corp. v. Railway Labor Execs.' Ass'n*

("Conrail"), 491 U.S. 299, 311 (1989) (RLA's purpose is to "diminish the risk of *interruptions in commerce*" and to avoid self-help actions that might "disturb *transportation services*") (emphasis added); *Pan Am. World Airways, Inc. v. Independent Union of Flight Attendants ("Pan Am.")*, 93 Lab. Cases (CCH) ¶ 13307 at 20,037 (S.D.N.Y. 1981) (RLA imposes certain obligations on both parties to a labor contract "in order to avoid interruptions in common carrier *service*") (emphasis added). The "interruption[s] to commerce or to the operation of any carrier" with which the RLA is concerned, then, are those that may cause injury or loss to the public, not merely affect a carrier's costs or profits.

In this case, the Sixth Circuit applied these standards and correctly concluded that there was no "interruption of operations" at ABX within the meaning of the statute. It was undisputed that, during the two months when most crewmembers declined to bid for open flying, the Company utilized effectively the procedures the parties had bargained for and was able to assign all open trips to its crewmembers. Not one employee refused to fly a trip that was assigned through the contractual alternatives to voluntary open flying. Most significantly, *not a single ABX flight was cancelled or delayed* because of the refusal of crewmembers merely to volunteer for open flying. Consequently, the crewmembers' action did not constitute a "strike" or an act of self-help and, as will be discussed below, it was not within the jurisdiction of the courts to enjoin.

ABX cites several cases where activity that was something less than an out-and-out work stoppage was enjoined. In contrast to the present case, however, all of those cases involved concerted activity that created substantial interruptions and disruptions in the carrier's daily operations.

For example, in *Delta Air Lines, Inc. v. Air Line Pilots Association, International*, 238 F.3d 1300 (11th Cir. 2001), the crewmembers refused to request voluntary open flying. However, unlike in the ABX-Local 1224 agreement, the alternative contractual mechanisms for assigning trips were "limited" and insufficient to allow the carrier to cover all of its flights; the crewmembers also allegedly avoided taking calls from the company that would have resulted in involuntary assignments. 238 F.3d at 1302, 1303. In those circumstances, the crewmembers' refusal to volunteer for *or* accept additional assignments forced the carrier to cancel some 5,200 passenger flights in six weeks because of a lack of pilots (compared to a normal average of just one or two flights out of a total of 2,700 flights daily).

Similarly, in *United Air Lines, Inc. v. International Association of Machinists*, 243 F.3d 349 (7th Cir. 2001), a campaign of slow-downs, "work-to-rules" actions and other activities by a passenger airline's mechanics resulted in significant effects on its operations. Among other things, the carrier's rate of maintenance "write-ups" on aircraft spiked, the number of aircraft held out of service for unscheduled maintenance doubled and then tripled over its usual average and, most significantly, the number of flights delayed or cancelled because of mechanical problems rose enormously, amounting to double the usual number during a November holiday travel season.

In *American Airlines, Inc. v. Allied Pilots Association*, 228 F.3d 574 (5th Cir. 2000), an illegal "sick-out" caused the cancellation of thousands of flights, costing the carrier tens of millions of dollars in lost revenues and affecting hundreds of thousands of passengers. *See also National R.R. Passenger Corp. v. American Fed. of R.R. Police*, 613

F. Supp. 602 (D.D.C. 1985) (Amtrak police officers engaged in "blue flu" sick-out and picketing with the effect of cancelled and delayed railroad service).

Indeed, *all* the reported cases relating to refusals to work overtime, sick-outs and other job actions short of full-blown strikes, whether under the RLA or the NLRA, have involved some identifiable interruption in the employer's production or services. *See, e.g., Philadelphia Newspapers, Inc. v. Newspaper & Mag. Employees Union*, 647 F. Supp. 236, 242 (E.D. Pa.) (mass exercise of job assignment "bumping" rights led to delays in production of newspaper on two shifts), *aff'd*, 808 F.2d 1517 (3d Cir. 1986); *American Ship Bldg. Co. v. Local Union 358, Bhd. of Boilermakers*, 459 F. Supp. 491 (N.D. Ohio 1978) (employees' concerted refusal to work overtime caused "significant delays in the production schedules regarding ships presently under construction or conversion"); *Texas Int'l Airlines v. Air Line Pilots Ass'n*, 518 F. Supp. 203, 207 (S.D. Tex 1981) (various actions by pilots delayed flights); *Pan Am.*, 93 Lab. Cases (CCH) ¶ 13307 (sick-out caused delays and understaffed flights); *Long Island R.R. Co. v. System Fed. No. 156*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968) (refusal of railroad carmen to work overtime resulted in backlog of work and cancellation of significant number of scheduled trains); *United Airlines v. International Ass'n of Machinists*, 54 L.R.R.M. (BNA) 2154 (N.D. Ill. 1963) (concerted refusal to work overtime resulted in a "decrease in utilization of plaintiff's airplanes [and] an increase in the backlog of repair and maintenance work to be performed").

In this case, however, ABX simply cannot argue with any force that there was an interruption to its flight or transportation operations. It therefore is reduced to trying to

make a case that the relatively slight additional expense involved in assigning open flights through contractual means other than open flying makes the pilots' action "self help" that can be enjoined in the same manner as a strike. The Sixth Circuit quite sensibly held that, although "higher costs and lost business opportunities can serve as evidence of an interruption of operations, ABX did not suffer sufficient economic harm in this case to show an 'interruption of operations.'" Appellate Opinion, Cert. Petition App. at 12a. The only loss that ABX proved was the estimated increased cost in premium pay of $200,000 over two months — a minimal amount when its revenues for the same period amounted to roughly $400 million.[2] It also claims a "loss" of $3 million for Christmas-season charter work (again, a relatively small amount for a company of this size). However, this claim is speculative at best, as the Company did not even bid for the work based on the mere possibility, unsupported by any facts, that it might not have pilots available to staff the charters. *Id.* at 4a, 12a.

ABX argues, essentially, that *any* activity of a union that puts any sort of economic pressure on an employer is an unlawful strike, a view the Sixth Circuit appropriately rejected. This argument ignores both the fact that the RLA was enacted to protect the public, not carriers, and the reality that a variety of activities by employees or their union may exert pressure, economic or otherwise, on an employer but still be perfectly legal. Equating a "loss of business or profit" with an "interruption of operations" would threaten many forms of expression that qualify for statutory or constitutional protection. Handbilling, for example, may cause people to

2. This figure is based on the Company's own statement of daily revenues of roughly $10 million per day, multiplied by a conservative 20 work days per month for the two months at issue.

refrain from utilizing an employer's services, with economic effects, yet it is a lawful activity in which union members may freely engage. Unions also may publicize labor disputes by informational picketing, media handouts, billboards, news interviews and advertisements, as well as through contacts with the carrier's customers, suppliers or vendors. All of these activities are designed to bring pressure to bear against the carrier, and each is capable of causing economic harm in the form of lost business or profit, yet none is thought to violate the RLA. *See, e.g., Railway Labor Execs. Ass'n v. Wheeling & Lake Erie Ry.*, 914 F.2d 53, 56 (4th Cir. 1990) (picketing is a form of free speech protected by the First Amendment); *Federal Express v. International Bhd. of Teamsters*, 617 F.2d 524 (9th Cir. 1980) (Norris-LaGuardia Act barred district court from enjoining informational picketing by a union where neither party could point to any procedure of the RLA that the union had failed to follow).

In this case, the Union members' actions were within the terms of the parties' contract, which specifically contemplates that not all open trips will be staffed through voluntary bidding and which provides the Company effective, if sometimes slightly more costly, methods of assigning the trips. ABX may dislike that process, but it is part of its bargain with the Union; the mere fact that there is more cost involved if the crewmembers do not bid voluntarily does not make their actions unlawful self-help. By way of analogy, the Company at least hypothetically could hire more full-time pilots to cover its lines of time and to serve as reserve crews, decline charter work or take other steps to reduce or even eliminate flights available to be assigned by bidding and junior manning and in any number of other ways reduce the crewmembers' compensation. By simply declining to exercise its contractual right to assign certain flights as extra work,

ABX obviously could affect the crewmembers economically — but it likely would not consider itself to be engaged in a breach of contract or in unlawful economic self-help.

There are costs for both sides associated with a collective bargaining agreement. ABX, concerned about the level of voluntary bidding on open flying, successfully negotiated provisions allowing it to involuntarily assign crewmembers to trips; the cost to it was the payment of a premium for some of those involuntary assignments. The Sixth Circuit properly rejected ABX's assertion that the additional cost to it, which it agreed to in the contract, in itself could make the crewmembers' exercise of a contractual right into a strike, in the absence of any effect on its flight schedules or on public commerce.

II.

THE SIXTH CIRCUIT PROPERLY HELD THAT THE ISSUES IN THIS CASE REPRESENT MINOR DISPUTES THAT DO NOT IMPLICATE THE "STATUS QUO" REQUIREMENTS OF THE RAILWAY LABOR ACT AND THAT ARE WITHIN THE EXCLUSIVE JURISDICTION OF A SYSTEM BOARD OF ADJUSTMENT AND NOT THE COURTS.

The Sixth Circuit correctly ruled that the dispute between the parties in this case is a "minor" one within the meaning of the RLA and that the courts therefore had no jurisdiction to become involved in the open flying issue absent a strike.

This Court has read the RLA as creating different standards and mechanisms for dispute resolution based on whether the particular dispute is "major" or "minor." A minor

dispute is defined as "a dispute related either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, Joliet & E. Ry. Co. v. Burley*, 325 U.S. 711, 723 (1945). By contrast, a "major dispute" is one that "relates to disputes over the formation of collective agreements or efforts to secure them. [Major disputes] arise where there is no such agreement or where it is sought to change the terms of one. . . ." *Id.* Above the level of negotiation and conference, minor and major disputes "follow a separate procedure." *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 35 (1957); *see generally* RLA Section 2, First, 45 U.S.C. § 152, First.

For a major dispute, the RLA mandates a "virtually endless" process of negotiation and mediation before a party can resort to self-help. *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987); *see generally* 45 U.S.C. §§ 155, 156. While a major dispute is "working its way through these stages [of negotiation and mediation], neither party may unilaterally alter the status quo." *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 n.14 (1969) (quoting *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 378 (1969)). This requirement arises from "three status quo provisions in the Act, each covering a different stage of the major dispute settlement procedures." *Shore Line*, 396 U.S. at 150 (citing RLA Section 7, Section 5, First and Section 10). The federal courts have jurisdiction to enjoin a party from making unilateral changes to the status quo pending exhaustion of the major dispute resolution processes. *See, e.g., Shore Line.*

For minor disputes, however, resolution by a binding arbitration procedure, not negotiation, is the primary means of settlement. The Act requires that airline employers and

unions establish a forum known as a system board of adjustment, which has exclusive jurisdiction over disputes relating to the enforcement or interpretation of collective bargaining agreements. *See* 45 U.S.C. § 184; *Conrail*, 491 U.S. at 312; *Andrews v. Louisville & N. R.R.*, 406 U.S. 320 (1972); *Pennsylvania R.R. v. Day*, 360 U.S. 561 (1961). The courts may enjoin strikes arising out of minor disputes, in order to protect the jurisdiction and processes of an adjustment board. *Conrail*, 491 U.S. at 304; *Chicago River*, 353 U.S. at 41.

However, there is no "general statutory obligation" to maintain the status quo pending resolution of a minor dispute by the applicable board. *Conrail*, 491 U.S. at 304; *see also id.* at 310. In the case of a minor dispute, then, "*[e]ach side* can act on its interpretation of the existing agreement[3] until the arbitration panel rules otherwise," even if one party's interpretation alters what is perceived to be the status quo. *General Comm. of Adjustment, United Transp. Union v. CSX,*

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3. ABX invites this Court to consider its proposition that only a union is bound to maintain the status quo during a minor dispute, while the employer is under no such restriction. It points to language in *Conrail* and other cases that refer to "the employer's" right to make changes subject to the arbitration process; obviously, the status quo cases refer most often to a carrier's unilateral change because it is generally the employer, not the union, that is in a position to implement its own interpretation of the contract. The fact that this Court has not yet been presented with a situation involving a union's application of its own interpretation does not indicate that the same principles should not apply. To the contrary, such an absurdly skewed and one-sided view of the obligations of the parties would undermine the balance between labor and management that the RLA attempted to create. More basically, however, this argument was never squarely presented to the trial or appellate court in this case and this Court should not even consider the issue.

893 F.2d 584, 594 (3d Cir. 1990) (emphasis added); *see also Air Line Pilots Ass'n v. Eastern Air Lines, Inc.*, 869 F.2d 1518, 1520 (D.C. Cir. 1989); *Burlington Northern R.R. v. United Transp. Union*, 862 F.2d 1266, 1272 (7th Cir. 1988); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 797 n.5 (1st Cir. 1986). As long as the actions of one party or the other are supported by an interpretation of their agreement that is neither frivolous nor obviously insubstantial, then the dispute is a "minor" one subject only to arbitration, and there is no obligation to maintain the status quo. *Conrail*, 491 U.S. at 304.

In this case, Local 1224 took the position that the real dispute related to whether the contract permitted the crewmembers to decline to bid for open flying even in concert, and the Union's privilege to advise its members of their contractual rights. The Union met its "relatively light" burden of showing that its position was arguably justified under the Contract and was, therefore, a "minor" dispute and not within the jurisdiction of the courts. *Conrail*, 491 U.S. at 304, 307. (To the extent ABX disputed this interpretation of the contract, its recourse was not to seek injunctive relief in the courts but to proceed to resolve this minor dispute through the contractual and statutory methods — which it failed to do.) The lower courts concluded that the primary dispute in this case was not the issue of contract interpretation over open flying rights but the grievance on the three-day scheduling rule, which ABX conceded was minor. Under either view, however, all of the conflicts between Local 1224 and ABX were minor disputes under the RLA, and the Sixth Circuit correctly found this matter was not within the courts' jurisdiction.

III.

THE SIXTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR WITH THE RULINGS OF ANY OTHER CIRCUIT COURTS.

The Petitioner asserts that the Sixth Circuit contravened earlier decisions of this Court in its conclusions that the courts have no jurisdiction to issue an injunction in the absence of a strike and that "certain types of concerted action" are available during a minor dispute. These rulings do not conflict with this Court's precedent but, rather, are fully consistent with the case law.

ABX maintains that this Court has held that the federal courts have jurisdiction to enjoin not merely strikes and other concerted interruptions of operations but "*all* forms of 'self-help' or 'economic duress' in aid of a minor dispute." Cert. Petition at 16 (emphasis in original). It cites for this proposition *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957), and *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963). Contrary to the impression that one might receive from the Petitioner's discussion of these two cases, neither of them ruled on — or even discussed — the question of enjoining actions that do not constitute a strike but involve some lesser form of "economic duress."

In *Chicago River*, the union flatly "called a strike" to push for resolution of a large number of pending grievances, admittedly minor disputes. 353 U.S. at 32. The union argued that the adjustment board procedures under the RLA were

merely voluntary and that, as the Court described it, the parties should be free to "resort to economic duress" if they chose. *Id.* at 34. However, despite the general reference to "economic duress," there was no activity involved in *Chicago River* other than an impending strike, and this Court never even considered such a distinction. Rather, the Court used the occasion to affirm the federal courts' authority "to issue necessary injunctive orders [to enforce compliance with the requirements of the Railway Labor Act]," *id.* at 42 (brackets in original), and to harmonize the RLA with the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. *Id.* at 40-42.

Similarly, this Court's decision in *Louisville* reaffirmed that a union may not strike over a minor dispute, in that case to enforce its interpretation of an adjustment board decision. Again the Court rejected an argument that in certain situations during a minor dispute the parties could be free to "resort[] to economic force," 373 U.S. at 40, but, again, the only economic self-help at issue was a full-blown strike. *Id.* at 34-35. Despite the Court's use of somewhat broader terms as synonyms for a strike, both of the cited cases involved out-and-out work stoppages that would have shut down the rail carrier involved and that have no relation to the sort of activity at issue in this case, which the Sixth Circuit concluded did not constitute either a strike or an interruption of the Company's operations.

This Court has recognized that the Norris-LaGuardia Act generally restricts the power of the federal courts to issue injunctions in labor disputes, holding only that certain provisions of the RLA take precedence over the more general Norris-LaGuardia provisions. *Louisville*, 373 U.S. at 42; *Chicago River*, 353 U.S. at 41-42. Accordingly, the courts

may enjoin strike actions that are intended to avoid or defeat the statutory processes for resolving minor disputes. *Louisville*, 373 U.S. at 38-42; *Chicago River*, 353 U.S. at 40-42.

In the present case, not only was there no "strike" but there also was no intended or actual evasion of the dispute resolution and arbitration procedures. There were a large number of disputes pending between the parties in August 1997, but they were being processed as grievances through the contractual steps; specifically, the dispute over the three-day scheduling rule was in the form of a grievance that was expedited to arbitration in October 1997. *See* Appellate Opinion, Cert. Petition App. at 3a; Findings & Conclusions, Cert. Petition App. at 19a-20a. The Petitioner's assertion that the Sixth Circuit "refused to enforce the minor dispute resolution procedures," Cert. Petition at 19, thus is demonstrably incorrect. In fact, the open flying "ban" did not subvert or impede the parties' arbitration procedures; unlike in *Louisville* and *Chicago River*, there was no need or justification for an injunction to preserve the purposes and processes of the Act.

ABX also claims the Sixth Circuit's decision "squarely conflicts" with recent decisions of the Seventh and Eleventh Circuits. To the contrary, those other decisions are readily distinguishable both legally and factually. Both of the cited cases involved employee or union activity that had an enormous impact on a passenger carrier's operations and flight schedule, and each occurred in the context of a major dispute, when a union was attempting to exert pressure on the employer in contract negotiations.

As already discussed, both the Seventh Circuit's decision in *United Air Lines, Inc. v. International Association of Machinists*, 243 F.3d 349 (7th Cir. 2001), and the Eleventh Circuit's case of *Delta Air Lines, Inc. v. Air Line Pilots Association, International*, 238 F.2d 1300 (11th Cir. 2001), involved concerted activity that had a substantial impact on the employer's operations, including grounded aircraft and numerous delayed or cancelled passenger flights. In this case, on the other hand, the uncontroverted evidence was that there was no such disruption to ABX's service. The facts in those other cases may have justified a conclusion that the unions' actions were strikes or unlawful self-help that were subject to being enjoined. However, there is no conflict with the Sixth Circuit's conclusion that the circumstances in this case simply did not constitute a strike that would permit judicial interference.

Second, and perhaps more significantly, both of the cited cases occurred in the context of a major dispute, when the parties were engaged in collective bargaining for a new labor contract. In the present case, however, the dispute is concededly minor. ABX presents complicated arguments for why this important distinction should be overlooked, but its arguments ignore the very real differences in both the statutory processes and the rights and obligations of the parties that turn on whether a dispute is major or minor. As noted, in a minor dispute "[e]ach side can act on its interpretation of the existing agreement. . . ." *General Comm. of Adjustment, United Transp. Union v. CSX*, 893 F.2d 584, 594 (3d Cir. 1990); *see also Conrail*, 491 U.S. at 304. As long as they did not engage in a strike or other concerted interruption of ABX's operations, Local 1224 and the crewmembers were free to act on their interpretation of the contract with regard to open flying even during the pendency

of a minor dispute. By contrast, in a major dispute neither party may resort to self-help to pressure the other side to accede to its bargaining demands unless and until the "virtually endless" negotiation and mediation process has concluded. *Burlington N. R.R. Co. v. Brotherhood of Maint. of Way Employees*, 481 U.S. 429, 444 (1987). The cited cases from two other circuits do not present a conflict with the Sixth Circuit's decision here and do not justify this Court exercising its authority to hear the case.

IV.

THIS CASE PRESENTS NO URGENT ISSUE UNDER THE RAILWAY LABOR ACT THAT REQUIRES THIS COURT'S ATTENTION.

The Petitioner implores the Court to hear this case on the grounds that it raises an important but unsettled question of law; specifically, it claims that what constitutes an "interruption of operations" and an unlawful act of "self-help" are issues "of extreme importance to the Nation's rail and air transportation systems." Cert. Petition at 25. ABX argues that the Sixth Circuit's decision leaves the lower courts at sea regarding the standards for determining when concerted activity rises to the level of an interruption of operations that may be enjoined. The Union submits that the appellate court's decision is both clear and reasonable and that the Petitioner's panicked view of both the case law and the current state of labor-management relations under the RLA is unpersuasive.

The case law that has been discussed here makes clear that there is no epidemic of concerted activity in this industry that inflicts harm upon employers but that is outside the courts' jurisdiction to enjoin. To the contrary, all of the

reported cases — with the lone exception of the one now before the Court — involved grounded aircraft or stopped trains, absent or unavailable pilots and crewmembers, delayed or cancelled flights or stranded passengers. Those cases quite clearly involved either flat-out strikes or clearly identifiable "interruptions of operations" for the affected carrier, and in all of them the courts exercised their jurisdiction to protect the public interest in transportation. In this case, there were no such effects and no grounds for judicial intervention.

ABX questions how trial courts in the Sixth Circuit will know when the economic effects of particular union or employee activity will be sufficient to constitute an "interruption." Quite obviously, as the appellate court indicated, economic harm that affects the regular operations of the carrier — such as by forcing it to cancel or delay flights — would meet that standard. However, the circumstances in which that issue might be presented are likely to be rare, as demonstrated by the fact that the situation presented in this case has not been confronted by other courts to date. If a similar circumstance is presented in the future, the lower courts are fully capable of evaluating the facts and applying the existing law in the same case-by-case manner in which the common law always has developed. Certainly, there is no urgent need for this Court to attempt to define the parameters of the law in this area merely for hypothetical cases in the future and no reason for it to grant certiorari on this grounds.

CONCLUSION

Respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — PORTIONS OF COLLECTIVE BARGAINING AGREEMENT BETWEEN ABX AIR, INC. AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION, EFFECTIVE JUNE 25, 1997

ARTICLE 13 – SCHEDULING

* * *

Section E – Open flying usage following Master Crew Schedule (Award) Distribution

Open Flying shall be distributed in the following order after the regular line(s) of time and reserve line(s) of times are awarded and the schedules are published showing the Open time available for bid.

1. Open Flying time shall be available, by seniority, for bid by any crewmember who:

   a. Needs to make his bid awarded line whole (i.e. reflect 15 days off) . . . .

   b. Requires a Vacation Replacement Trip.

   c. Requires a Training Failure Make-up Trip.

   d. Desire to bid back a day on which they were displaced for training . . . .

Appendix

2. Crew Scheduling may assign a replacement trip to a crewmember that fails to bid a trip(s) to make their bid awarded line whole. Such replacement trips shall comply with the line construction rules contained in D.3.a. through d.

3. Open Flying time shall be awarded in accordance with seniority to any crewmember bidding a particular trip, who wishes to pick up additional flying (days and/or hours) on a previously scheduled work day, or day off. Open Flying shall not be awarded if it makes the crewmember illegal, for a preceding or following trip, or violates the provisions of Section P. of this Article.

4. In the event regular lineholders do not bid the equivalent of one (1) day per Regular Line of Time as shown on the Bid Master Crew Schedule [i.e. sixty (60) days bid when there are sixty (60) regular lines of time on the Bid Master Crew Schedule], the Company may assign open flying until an average combined total of one (1) day per Regular Line of Time has been bid or assigned [i.e. with forty (40) days bid the Company may assign twenty (20) days when there are sixty (60) regular lines of time on a Bid Master Crew Schedule]. Open flying shall be assigned in reverse order of seniority at one day per Regular Line of Time to no more than the bottom seventy-five percent (75%) of the lineholders holding Regular Lines of Time as shown on the Bid Master Crew Schedule. If assigning one (1) day per Regular Line of Time to no more than the bottom seventy five percent (75%) of the Regular lines of Time does not meet the requirement above, one (1) additional day may be assigned, in reverse order of seniority, to no

more than the bottom fifty percent (50%) of the line holders holding Regular Lines of Time as shown on the Bid Master Crew Schedule. No assigned trip shall be isolated from the existing blocks of time on the crewmember's line unless it is on the first or last day of the bid period. In no event shall such assignment reduce the blocks of time off below those required in Article 13, Section D.3.a. through e., nor may any line of time contain any block longer than eight (8) days. In addition, a regular line holder shall receive no less than a minimum guarantee of thirteen (13) days off as reflected on the Master Crew Schedule.

5. Open Flying shall be used to construct Build-up Lines in accordance with the scheduling rules contained in Section D.3. of this Article. Build-up Lines shall be constructed any time enough trips are available to build lines with fifteen (15) days away in a thirty (30) day month or sixteen days away in a thirty-one (31) day month. These Build-up Lines shall be offered and awarded to those crewmembers holding Reserve Lines of Time who had bid a Build-up Line on their bid sheet.

6. After Open Flying time has been awarded in accordance with this Section, any remaining Open Flying time or any time which becomes open during the month, shall be awarded to a crewmember(s) in accordance with Section N. of this Article.

* * *

Appendix

Section L – Emergency Coverage

1. If, due to unforeseeable circumstances, the Company's crewmember requirements are not met through the provisions of the "Order of call up", (i.e., reserves), the Company may assign emergency replacement crewmember(s).

2. Emergency replacements shall be assigned in reverse order of seniority, to the most junior crewmember available when the need is known, who can take the trip without causing delay of the scheduled departure, provided that such assignment does not reduce the crewmember's number of day(s) off below thirteen (13).

3. If no such crewmember is available, the Company may, under the provisions of Paragraph 1. of this Section, assign a crewmember to a duty that reduces the number of day(s) off below thirteen (13) day(s) off, provided that the crewmember is granted an equal number of day(s) off at a later date. These day(s) off shall be granted during the same bid period if possible; however, under all circumstances within thirty (30) days of the time the assignment was made.

4. Crewmembers assigned under this emergency replacement policy shall be compensated in accordance with Article 19 of this Agreement, in addition to their monthly guarantees for that bid period.

* * *

Appendix

Section N – Continual Open Flying

1. The Company shall maintain a Continual Open Flying (COF) bid . . . .

* * *

4. Open Flying time may be offered to management crewmember(s) for their proficiency.

5. Open Flying time may be assigned to crewmember(s) holding Reserve line(s) of time.

* * *

7. Open Flying time shall be assigned to crewmember(s) in reverse order of seniority in accordance with Section L. of this Article.

* * * *

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No. 01-914

IN THE

Supreme Court of the United States

ABX AIR, INC.,

Petitioner,

v.

AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC., AIRLINE INDUSTRIAL RELATIONS CONFERENCE AND NATIONAL RAILWAY LABOR CONFERENCE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Air Transport Association of America, Inc. ("ATA"), the Airline Industrial Relations Conference ("AIRCON"), and the National Railway Labor Conference ("NRLC") move for leave to file a brief as *amici curiae* in support of ABX Air, Inc.'s petition for certiorari. A copy of the proposed brief is bound together with this Motion. *Amici* file this Motion because respondent Airline Professionals Association of the International Brotherhood of Teamsters, Local Union No. 1224, AFL-CIO, refused to consent to the filing of the brief. In support of this Motion, *amici* state the following:

1. ATA is a membership organization comprised of twenty-one U.S. certificated air carriers.[1] ATA represents its members in a variety of legislative, judicial, and regulatory matters and provides the industry perspective to government agencies on a wide variety of issues affecting ATA's members. AIRCON is a membership association of twenty U.S. certificated air carriers.[2] AIRCON was formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry, and to

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1. ATA's members are ABX Air/Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express, Hawaiian Airlines, JetBlue Airways, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are Aerovias de Mexico, Air Canada, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

2. AIRCON's members overlap with those of ATA, except that (1) Evergreen International and Polar Air are members of ATA but not members of AIRCON; and (2) AirTran Airways is a member of AIRCON but not of ATA.

represent the member carriers with respect to employment-related legislative, judicial and administrative matters. Together, ATA's and AIRCON's members account for more than 97% of the domestic passenger and cargo traffic flown annually by U.S. carriers and employ over half a million people.

2. The members of the NRLC include all United States Class I freight railroads and many smaller lines.[3] The NRLC, through its National Carriers' Conference Committee, represents most of its members in multi-employer collective bargaining with the thirteen major rail unions. It also advises railroads on labor-related matters; administers industry-wide health and welfare plans for rail employees; represents the industry on rail labor issues before congressional committees, other governmental bodies, and the courts; provides training programs; and represents railroads in labor arbitration cases before the National Railroad Adjustment Board and other tribunals.

3. All three *amici* have filed numerous *amicus* briefs in federal and state court proceedings concerning a variety of transportation-related issues. ATA and AIRCON have previously submitted briefs in this Court in numerous cases including *US Airways, Inc. v. Barnett*, No. 00-1250 (2001); *Eastern Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57 (2000); and *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 486 U.S. 1014 (1988), and ATA has also done so in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and in *Norris*. NRLC has filed briefs as *amicus curiae* in numerous cases including *Brown v. Pro Football*, 518 U.S.

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3. The Class I freight railroads include Burlington Northern and Santa Fe Railway Company, Soo Line Corporation, Illinois Central Railroad Co., Grand Trunk Western Railroad, CSX Transportation, Inc., Kansas City Southern Railway Co., Norfolk Southern Railway Company, and Union Pacific Railroad Co.

231 (1996); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994); and *Conrail v. RLEA*, 491 U.S. 299 (1989).

4. Because of the unique role the rail and airline industries serve in the American economy, Congress devised a labor relations process solely for these industries, the Railway Labor Act. The decision of the Sixth Circuit in this case effectively repudiates the dispute resolution mechanism embodied in that legislation, a system designed to prevent labor disputes from interrupting interstate commerce or carrier operations. The decision does so by authorizing unions in the airline and rail industries to use job actions as a means for resolving so-called "minor disputes," *i.e.*, disagreements over the meaning and application of collective bargaining agreements. This holding cannot be reconciled with the relevant decisions of this Court or the uniform decisions of the other circuits and it has potentially disastrous implications for the stability of labor relations in the airline and railroad industries. By giving unions the option to reject arbitration in favor of collective action, the opinion threatens to undermine the very purpose for which the Railway Labor Act was enacted. *Amici* are uniquely situated to explain the destabilizing impact the decision below portends. For this reason, *amici* seek leave to file the accompanying brief and urge the Court to grant review.

Respectfully submitted,

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INTERESTS OF *AMICI* [4]

Amici and their interests in this case are identified in the accompanying Motion for Leave to File Brief *Amici Curiae*, and in the Introduction that follows. Accordingly, and in the interests of brevity, those matters are not repeated here.

INTRODUCTION

The court below held that an airline or railroad union contesting the meaning of its labor agreement can lawfully institute a job action to force the carrier to accede to the union's view of the contract. It may do so, the court held, rather than submit the disagreement to the Railway Labor Act's ("RLA" or the "Act") minor dispute "grievance procedures [created by Congress] to be a compulsory substitute for economic self-help, not merely a voluntary alternative to it." *Brotherhood of Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33, 39 (1963). As explained below, this holding is wrong as a matter of statutory interpretation and is irreconcilable with a long and uniform line of authority from this Court and the other courts of appeals.

This holding, however, is not simply an erroneous construction at the margins of the statute. Rather, this decision repudiates the RLA's comprehensive, mandatory, and exclusive dispute resolution processes and represents a genuine threat to the stability of airlines and railroads, industries Congress deemed to be vital to the economic life of this nation. The processes of the Act were designed as an orderly *substitute* for economic warfare; the decision below is an open *invitation* to this kind of upheaval. The Act makes arbitration the *sole* means for resolving contract interpretation disputes; the court of appeals' decision promises labor an *alternative* means for achieving its desired results. And because the self-help alternative created by the court below is available to labor regardless of the strength of the union's position on the merits of the underlying contractual

4. No counsel for either party authored this brief, either in whole or in part. No entity other than the *amici* and their members made any monetary contribution to the preparation or submission of this brief.

interpretation dispute, the job action alternative becomes even more valuable to the union when its contractual position is most frivolous.

The decision in this case stands as a negation of legislative intent and the decisions of this Court, and a threat to stability in a vital sector of the economy. In an area of law, and in industries, where uniform national regulation is essential, the court of appeals' contrarian view is intolerable. Certiorari should be granted and the decision below reversed.

STATEMENT

1. ABX, Inc., is an air express cargo carrier doing business as Airborne Express. Its pilots are represented for collective bargaining purposes by the Airline Professional Association of the International Brotherhood of Teamsters, Local 1224 (the "Union" or the "Teamsters").

2. The dispute at issue in this case involves a provision in the parties' collective bargaining agreement that guaranteed Teamster members three consecutive days off under certain circumstances. A number of grievances were filed by Teamsters members over the application of that provision.

3. The Teamsters decided, however, not to take chances with the arbitration process. Instead of leaving the dispute to an arbitrator, the Union decided to announce an overtime embargo against ABX in an attempt to force the airline to concede on the merits of the grievances before they could be arbitrated.

4. Thus, in August of 1997, the Teamsters instructed its members to refrain from bidding on overtime (called "open lines of time" or "open flying"). The campaign was a resounding success. None of ABX's pilots bid for open time in September, and of 617 available open lines of time in October, bids were submitted for only 13. Pilots submitting bids for open time were harassed with Teamster knowledge and acquiescence.

5. This campaign had a significant impact on ABX's operation. Like virtually every commercial airline (whether passenger or cargo carriers), ABX's regular pilot work schedules are constructed with a mix of fixed work assignments

(also known as "lines of time") and a certain amount of open time, which is not pre-assigned to a particular pilot or which becomes "open" because the assigned pilot becomes unavailable (*e.g.*, due to illness, vacations or training). The amount of open time built into a schedule is based on the knowledge gained through years of experience that a predictable number of pilots will bid for the open time to increase their incomes. This practice gives the airline flexibility to place resources where they are needed. When the Teamsters instructed its members to refrain from bidding on open time — and punished those who dared to ignore the directive — it forced ABX to pay extraordinary premiums to junior pilots who were then mandatorily assigned to these "open" operations. The premiums paid for these "junior manning" assignments amounted to hundreds of thousands of dollars. Moreover, because the Teamsters had succeeded in its goal of rendering ABX's manpower situation wholly unpredictable, ABX was forced to withdraw from seeking business accounting for $3 million in profits that historically ABX had acquired over the holiday season.[5]

6.a. ABX sought a preliminary injunction against the Teamster's concerted job action in the United States District Court for the Southern District of Ohio. District Judge Sandra Beckwith found that the Teamsters had conceived, instigated, and enforced the overtime embargo, and that to that date, the embargo had cost ABX roughly $200,000 in increased labor costs. Judge Beckwith decided, however, that she had jurisdiction to enjoin self-help under the RLA only if it took the form of a strike (or the functional equivalent of a strike). Because ABX had managed to staff all of its flights without delays or cancellations despite the job action, Judge Beckwith concluded she had no authority to enter an injunction.

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5. Because there are contractual and regulatory limits on the amount of flying any individual can perform in a given period, the "junior manning" solution to an overtime embargo may only partially remediate an overtime embargo.

b. After a trial on the merits, however, the district court enjoined the embargo. The court found that: (1) the overtime embargo was "conceived . . . and promoted" by the Teamsters' Executive Board (Pet. App. 21a); (2) the Teamsters intended to continue the embargo "for as long as [ABX] refused to adopt the interpretation of the collective bargaining agreement urged" by the Teamsters (*id.*); and (3) as the Teamsters had intended, the embargo had cost ABX hundreds of thousands of dollars in direct labor costs and had forced it to withdraw from $3,000,000 in additional profits for business ABX had traditionally done. *Id.* at 22a. The court concluded that a "concerted refusal to work overtime . . . violates the union's duty, under § 2 First of the RLA, to 'settle all disputes . . . in order to avoid any interruption to commerce.'" *Id.*

7. A panel of the Sixth Circuit affirmed all of the district court's factual findings — the presence of a job action, the Union's complicity, the direct and consequential financial damage purposefully done to ABX — but nonetheless reversed. The court of appeals acknowledged that an overtime embargo could be unlawful if used by a union to achieve its goals in a *major* (*i.e.*, a bargaining) dispute, but held that the same conduct is entirely lawful if the underlying controversy is a *minor* (or arbitrable grievance) dispute. The court also concluded that as a matter of law, a union job action cannot be enjoined if its "only" impact is to bleed the airline's financial resources. Pet. App. 13a. Because ABX was able to staff its operations by using mandatory overtime, no flights were delayed and none was canceled; therefore, the court held, there was no "concerted interruption of operations." *Id.* Acknowledging ABX's "higher operational costs" and "losses from foregone contract opportunities [from] seasonal contracts," the court concluded that ABX's "*regular business base* was not impaired," and therefore the embargo was not a "strike" that could be enjoined. Pet. App. 13a (emphasis added). Resting its decision on these distinctions — *i.e.*, between ABX's *regular* and its *seasonal* business, between *economic* harm and flight cancellations, and

between *major* and *minor* disputes — the court held there was nothing wrong with the union's tactics, and ABX was entitled to neither an injunction nor damages.

SUMMARY OF ARGUMENT

This case possesses every one of the hallmarks of a case worthy of review. First, the case poses a question of exceptional importance to two industries of vital concern to the nation. The decision below encourages unions in the rail and airline industries to take their labor disputes to the streets, rather than to arbitration, undermining the statutory system of arbitration uniformly held — until now — to be exclusive and mandatory, a system that has served the rail and airline industries well for more than 65 years. A union contemplating arbitration of a contractual grievance must consider the merits of its position and its chances of success; a union considering the collective action licensed by the court of appeals is not so constrained. Because the union can apply the collective muscle of its members without regard to the strength of its contractual position, the job action alternative to arbitration sanctioned by the court of appeals is most welcome to a union when its contractual position is most frivolous. The decision thus invites more disputes and more job actions.

Second, the decision below turns its back on a long line of authority from this Court and creates an intolerable division of authority among the courts of appeals. This Court has held time and again that the statutory grievance and arbitration procedures adopted by Congress in 1934 form a "compulsory substitute for economic self-help, not merely a voluntary alternative to it." *Brotherhood of Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33, 38 (1963) (describing "mandatory, exclusive and comprehensive system" for resolving minor disputes). The decision below, however, licenses — even encourages — labor to resolve contract disputes through collective action rather than through arbitration.

Third, and quite apart from its infidelity to the decisions of this Court and those of the other circuits, the decision below

was plainly misguided — as a matter of statutory construction and as a matter of federal labor policy. The court of appeals concluded that a union has two alternatives when faced with a dispute over the interpretation of its collective bargaining agreement: (a) submit the dispute to final and binding arbitration before a system board of adjustment, "a mandatory, exclusive and comprehensive system for resolving grievance disputes"[6]; or (b) attempt to punish the airline through a concerted job action until the airline is compelled to surrender to the union's view. The court offered two justifications for this conclusion.

The court first held that in a contract interpretation (or "minor") dispute like this one, "there is no requirement [that a union] maintain the status quo, thus making certain types of concerted action available that would not be during a major [or contract formation] dispute." Pet. App. 12a. In reaching this conclusion, the court ignored Section 2 First of the Act, 45 U.S.C. § 152 First, which explicitly directs employers *and employees* "to exert every reasonable effort to make *and maintain* agreements concerning rates of pay, rules, and working conditions, and to settle *all* disputes, whether *arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier. . . .*" (emphasis added).

The court also concluded that because the particular economic weapon chosen by the Union in this case — a concerted refusal to fly overtime — did not result in canceled or delayed flights, it did not constitute a "concerted interruption of operations" and thus could not be enjoined. Pet. App. 13a. The court found, as a matter of law, that ABX's operations were not interrupted even though, as the court acknowledged, ABX was forced by the union's conduct to pay hundreds of thousands of dollars in contractual premiums to staff its flights and to withdraw from a potential $3 million in profits for operations that it predicted it could not staff because of the manpower

6. *Gunther v. San Diego & A. E. Ry.*, 382 U.S. 257, 264 (1965); *Louisville*, 373 U.S. at 38.

shortage the union had instigated. This conclusion was mistaken. An airline's operations include not only the flights it is scheduled to make on any given day, but also its operating costs and its marketing operations aimed at securing flights for tomorrow. The Teamsters knew this; its avowed purpose in the war it declared on ABX was to inflict economic injury sufficient to bring the airline to its knees. The RLA cannot be construed as encouraging this sort of pressure tactic.

The union did not want an arbitrator to decide the meaning of its collective bargaining agreement, and instead tried to force carrier capitulation by inflicting economic damage, to use collective action to compel the airline to concede on the contract dispute. That cannot be reconciled with the Act, with the policies that are its foundation, or with the decisions of this Court that effectuate it.

Indeed, the law applicable to this case "is settled and stable, the facts are not in dispute, and the decision below is [so] clearly in error" that summary disposition would be warranted. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). *Amici* urge the Court to grant review in this case and reverse the decision below.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Directly and Unambiguously Conflicts With The Relevant Decisions Of This Court

A. The Railway Labor Act Was Designed As A Substitute For Economic Warfare, But The Decision Below Encourages Union Job Actions In Preference To The Act's Procedures

The purposes of the RLA are neither obscure nor difficult to articulate:

> To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; . . . [and] to provide for the prompt and

> orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. §§ 151a(1), (4), and (5).

To achieve these ends, Congress devised a seamless, exclusive, and comprehensive system for the orderly resolution of labor-management disputes. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Atchison, T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 562, 566 (1987) ("The RLA . . . provides a comprehensive framework for the resolution of labor disputes"). Bargaining, or "major," disputes — *i.e.*, those over the acquisition of new contractual rights — are resolved through bilateral negotiations, mediation under the auspices of the National Mediation Board ("NMB"), and, if necessary, the intercession of a Presidential Emergency Board and Congress. It is only when matters remain unresolved at the end of this "purposely long and drawn out" process that self-help is permitted. *Detroit & Toledo S.L. R. Co. v. UTU*, 396 U.S. 142, 149 (1969) (quoting *Brotherhood of Ry. & S.S. Clerks v. Florida E. C.R. Co.*, 384 U.S. 238, 246 (1966)). Representation disputes — controversies over whether employees will be represented for bargaining purposes, and if so, by whom — are committed to the all-but-unreviewable discretion of the NMB. *Switchmen's Union v. NMB*, 320 U.S. 297 (1943).

And as this Court has held time and time again, Congress decided that arbitration should be the "mandatory, exclusive and comprehensive [process] for resolving grievance disputes." *Gunther v. San Diego & A. E. Ry.*, 382 U.S. 257, 264 (1965) (quoting *Louisville*, 373 U.S. at 40); *see also Norris*, 512 U.S. at 252 (noting "mandatory arbitral mechanism for 'the prompt and orderly settlement'" of minor disputes); *Conrail v. RLEA*, 491 U.S. 299, 303 (1989) (arbitration boards have "exclusive jurisdiction over minor disputes"); *Brotherhood of Locomotive Engineers v.*

Louisville & N. R.R., 373 U.S. 33, 38 (1963) (describing "mandatory, exclusive and comprehensive system" for resolving minor disputes).[7] As the Court explained in *Andrews v. Louisville & N. R.R.*, 406 U.S. 320, 322 (1972):

> "Provision for arbitration of a . . . minor dispute is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before [arbitration boards] established under the Act." Thus, the notion that the grievance and arbitration procedures provided for minor disputes in the Railway Labor Act are optional, to be availed of as the employee or the carrier chooses, was never good history and is no longer good law.

Id. at 322 (citation omitted).

The decision below cannot be reconciled with these cases. It holds explicitly that the Act's arbitral procedures are *not* mandatory, *not* exclusive, and *not* comprehensive. It holds that the Act's minor dispute resolution processes do *not* constitute a "compulsory substitute for economic self-help," but rather are merely "a voluntary alternative to it." It endorses the disorder of collective action rather than the orderly, statutorily prescribed process of arbitration. The court of appeals did not merely ignore the relevant decisions of this Court;[8] it rejected *in toto* Congress'

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7. The arbitration process used in the airline industry is somewhat different from that used by the railroads. In the latter industry, arbitration may occur before national boards of adjustment created by the Act itself, or before Special Boards of Adjustment or Public Law Boards created by the parties. 45 U.S.C. § 153. In contrast, there is no national board for airlines and the Act compels airlines and unions to form company-specific "system boards of adjustment." 45 U.S.C. § 184. In all these arbitration mechanisms, the adjustment boards have mandatory and exclusive jurisdiction over minor disputes. *Norris*, 512 U.S. at 252.

8. The courts of appeals have been faithful to these decisions, and therefore the decision below creates a conflict with, at least, the following decisions. *D.C. Circuit*: *ALPA v. Eastern Air Lines, Inc.*, 863 F.2d 891, 895-96 (D.C. Cir. 1988) ("the arbitration board's jurisdiction over minor

(Cont'd)

rationale for fashioning the RLA's arbitration processes. For that reason alone, review should be granted.

(Cont'd)

disputes is exclusive; . . . A union cannot make a minor dispute the subject of a strike"); *ALPA v. Northwest Airlines, Inc.*, 627 F.2d 272, 275 (D.C. Cir. 1980); *First Circuit*: *National R.R. Passenger Corp. v. IAM*, 915 F.2d 43, 47 (1st Cir. 1990) ("parties' dispute over the discipline of the Union representatives constitutes a 'minor dispute' under the RLA, . . . and as such is within the exclusive jurisdiction of the Adjustment Boards"); *Maine Cent. R.R. v. UTU*, 787 F.2d 780 (1st Cir. 1986); *Second Circuit*: *BLE v. Long Island R.R.*, 85 F.3d 35 (2d Cir. 1996); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F.2d 139, 141 (2d Cir. 1986) (adjustment boards "have exclusive jurisdiction over 'minor disputes'"); *Third Circuit*: *IACP v. Continental Airlines*, 155 F.3d 685, 691 (3d Cir. 1998) ("Minor disputes are subject to mandatory arbitration by the relevant board of adjustment, and may not be the subject matter of strikes. . . ."); *RLEA v. Consolidated R. Corp.*, 845 F.2d 1187 (3d Cir. 1988); *Fourth Circuit*: *UTU v. S. Carolina Pub. Ry. Comm'n*, 130 F.3d 627 (4th Cir. 1997); *RLEA v. Hotel Employees & Rest. Employees Int'l Union*, 915 F.2d 116 (4th Cir. 1990); *Fifth Circuit*: *APA v. American Airlines, Inc.*, 898 F.2d 462 (5th Cir. 1990); *Brotherhood of Ry. Carmen v. Atchison, T. & S. F. R. Co.*, 894 F.2d 1463 (5th Cir. 1990); *Morales v. S. Pac. Transp. Co.*, 894 F.2d 743, 745 (5th Cir. 1990) ("The Railway Labor Act provides a comprehensive scheme of mandatory procedures for the prompt and orderly settlement of 'major disputes' and 'minor disputes' between carriers, unions, and employees."); *Sixth Circuit*: *Teamsters v. ABX Air, Inc.*, 2001 U.S. App. LEXIS 26911, at *5 (6th Cir. Dec. 13, 2001) (dispute over cockpit voice recorder was "'minor dispute' under the RLA, over which an appointed adjustment board exercises exclusive jurisdiction"); *Seventh Circuit*: *Division No. 1, BLE v. Consolidated Rail Corp.*, 844 F.2d 1218 (6th Cir. 1988); *Monroe v. Missouri Pac. R. Co.*, 115 F.3d 514, 516 (7th Cir. 1997) (All minor disputes "must be adjudicated under RLA mechanisms, which include an employer's internal dispute-resolution procedures and an adjustment board established by the unions and the employer"); *Brotherhood of Ry. Clerks v. Atchison, T. & S. F. R. Co.*, 847 F.2d 403, 406 (7th Cir. 1988) (RLA required the union and the employer to bring their minor dispute before the Adjustment Board, "the present dispute is a minor dispute within the exclusive jurisdiction of the NRAB");

(Cont'd)

B. Union Self-Help Taken To Short-Circuit Or Circumvent The RLA's Minor Dispute Resolution Processes Must Be Enjoined

Because each of the Act's dispute resolution mechanisms is mandatory and, within its sphere, exclusive, any self-help taken by the parties to circumvent those mechanisms is unlawful and should be enjoined. More specifically, when a union tries to force a solution to an RLA dispute by instituting a job action rather than submitting the dispute to the appropriate statutory process, it acts illegally and must be enjoined. *See, e.g., Chicago & N.W. R. Co. v. UTU*, 402 U.S. 570 (1971) (in major dispute, a union's resort to self help prior to exhaustion of the Act's bargaining procedures is unlawful and should be enjoined); *Brotherhood of R.R. Trainmen v. Chicago River & I. R. Co.*, 353 U.S. 30 (1957) (affirming injunction against union self-help over minor dispute).

The Court has affirmed injunctions in two minor dispute cases materially indistinguishable from this one. In *Chicago River*, the union struck over 21 outstanding grievances rather

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Chicago & N. W. Transp. Co. v. RLEA, 855 F.2d 1277 (7th Cir. 1988); *Eighth Circuit*: *Sheet Metal Workers' Int'l Ass'n v. Burlington N. R. Co.*, 893 F.2d 199, 202 (8th Cir. 1990) ("purpose of the RLA is to prevent the disruption of the Nation's rail service by requiring unions and management to attempt to settle all contractual disputes and minor grievances using the procedures provided in the RLA"); *Ninth Circuit*: *Hubbard v. United Air Lines*, 927 F.2d 1094, 1096 (9th Cir. 1991) ("adjustment board created under the RLA has exclusive jurisdiction over minor disputes"); *ALPA v. Alaska Airlines*, 898 F.2d 1393 (9th Cir. 1990); *Tenth Circuit*: *BMWE v. Union Pac. R.R.*, 2000 U.S. App. LEXIS 33454, at *6 (10th Cir. Dec. 21, 2000) ("RLA provides a mandatory arbitration system for settling two classes of labor disputes: 'major disputes' which 'seek to create contractual rights,' or 'minor disputes' which 'enforce them.'"); *Ertle v. Continental Airlines*, 136 F.3d 690, 693 (10th Cir. 1998) ("Congress provided for a mandatory arbitral mechanism, which vests exclusive jurisdiction . . . with the . . . Adjustment Board."); *Zimmerman v. Atchison, T. & S. F. R. Co.*, 888 F.2d 660 (10th Cir. 1989).

than submit to the jurisdiction of the adjustment board. The district court enjoined the strike and the court of appeals affirmed. On review, this Court carefully analyzed the history of the original 1926 Act, noting that "[t]he obvious lack of any compulsion toward a settlement of disputes was a basic characteristic of the [original] Act and proved to be a major weakness in the procedures for handling 'minor disputes.'" *Id.* at 35. This led to the Act's 1934 amendments which, its labor detractors correctly observed, brought "about compulsory arbitration and prevent[ed] the use of the only weapon in the hands of organized labor," *i.e.*, economic self-help. *Id.* at 39. The Court noted that the Act "endeavored to bring about stable relationships between labor and management" by providing compulsory and orderly mechanisms for resolving disputes. *Id.* at 40. When a union seeks to achieve its goals by self-help instead, the Court held, it must be enjoined.

Similarly, in *BLE v. Louisville & N. R.R.*, the union sought to enforce its construction of an arbitration award by a job action, rather than through the Act's procedures for enforcing arbitration awards. The district court enjoined the job action, the court of appeals affirmed, and this Court agreed. The

> statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes. . . . The right of one party to place the disputed issue before the Adjustment Board, with or without the consent of the other, has been firmly established. *And the other party may not defeat this right by resorting to some other forum. . . . Congress had intended the grievance procedures [of the Act] to be a compulsory substitute for economic self-help, not merely a voluntary alternative to it.*

373 U.S. at 38-39 (emphasis added, citations omitted). Accordingly, the union's attempt to force a solution to the dispute in "some other forum," *i.e.* through concerted conduct, rather than in arbitration, was properly enjoined.

The court of appeals here reversed the injunction ABX obtained in the district court, holding that the job action was an alternative to arbitration the Union was entitled to select. That result cannot possibly be reconciled with the Court's decisions or the text of the Act.[9]

II. The Court Of Appeals Ignored These Fundamental Principles

As explained above, the court of appeals' decision cannot be reconciled with the Court's cases, and the court below did not try to do so. Rather than attempting to grapple with the Court's opinions directly, the court of appeals identified two characteristics that, it found, distinguished the case at hand from contrary appellate decisions and made injunctive relief unavailable to ABX. Neither characteristic is relevant to the principles on which the Act is based or to the analysis sanctioned by this Court's prior decisions

A. The Prohibition On Self-Help Applies To Major And Minor Disputes

The court began by asserting that in a minor dispute, "there is no requirement [that a union] maintain the status quo, thus making certain types of concerted action available that

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9. The courts of appeals, until now, have universally recognized that collective economic action in derogation of the Act's minor dispute procedures must be enjoined. The decision below is therefore in direct and irreconcilable conflict with, at least, the following appellate decisions: *Chicago & N.W. Transp. Co. v. RLEA*, 908 F.2d 144 (7th Cir. 1990); *Southeastern Pa. Transp. Auth. v. Brotherhood of R. Signalmen*, 882 F.2d 778 (3d Cir. 1989); *Long Island R.R. v. IAM*, 874 F.2d 901 (2d Cir. 1989), *cert. denied*, 493 U.S. 1042 (1990); *Missouri Pac. Ry. v. UTU*, 782 F.2d 107 (8th Cir. 1986); *Atchison, T. & S. F. R. Co. v. UTU*, 734 F.2d 317 (7th Cir. 1984); *Trans Int'l Airlines, Inc. v. Teamsters*, 650 F.2d 949 (9th Cir. 1980); *Southern Pac. Transp. Co. v. UTU*, 491 F.2d 830 (9th Cir. 1974); *Piedmont Aviation, Inc. v. ALPA*, 416 F.2d 633 (4th Cir. 1969); *Illinois Cent. R.R. v. BRT*, 398 F.2d 973 (7th Cir. 1968); *Switchmen's Union v. Southern Pac. Co.*, 398 F.2d 443 (9th Cir. 1968); *Order of R. Conductors & Brakemen v. Spokane, P. & S. R. Co.*, 366 F.2d 99 (9th Cir. 1966).

would not be during a major [or contract formation] dispute." Pet. App. 12a. As previously noted, however, this Court has twice affirmed injunctions entered to prevent unions from using economic self-help as a mechanism for resolving minor disputes. The Court also has made clear that economic self help is prohibited in minor as well as major disputes. In the minor dispute context, this Court has held explicitly, that "Congress . . . intended the [Act's] grievance procedures *to be a compulsory substitute for economic self-help*, not merely a voluntary alternative to it." *Louisville*, 373 U.S. at 38-39. The Court also has held that the Act's central imperative — that the parties use the Act's dispute resolution processes *rather* than self help — applies to "all disputes . . . arising out of the application of agreements" and thus applies "to all disputes, both major and minor. . . ." *Elgin, J. & E. Ry v. Burley*, 325 U.S. at 724-25, 729 (1947). For this reason, the court in *Louisville*, 373 U.S. at 40, explicitly rejected "the . . . argument . . . that Congress intended to permit the settlement of minor disputes through the interplay of economic force. . . . [This assertion] is squarely in conflict with the basic teaching of" the Court's prior cases. When a union tries to do so, it must be enjoined.

B. The Form Of Self-Help Chosen By The Union Is Irrelevant; Any Effort To Avoid The Act's Mandatory Procedures Is Unlawful

The court of appeals then held that the RLA permits unions to pressure employers to capitulate in grievance disputes so long as the economic weapon selected by the union does not result in delays or cancellations. This distinction finds no support in the language of the Act, its policies, or the decisions of this Court.

First, as described above, the Act makes arbitration before a system board the *mandatory and exclusive* recourse for "*all* disputes . . . arising out of the application of agreements," and this Court has held that grievance disputes *cannot* lawfully be decided "through the interplay of economic force." *Louisville*. 373 U.S. at 40. Nothing in the Act distinguishes between

permissible and impermissible types of economic force a union might use to compel a non-arbitral resolution of minor disputes; *any* form of economic force used to wrest jurisdiction over a minor dispute from the adjustment boards is impermissible. The Court noted in *Louisville* that "economic self-help" is improper in a minor dispute and must be enjoined, and failed to establish separate categories for permissible and impermissible forms of "economic self-help." 373 U.S. at 39. Again in *Chicago River,* the Court characterized "*economic duress*" generally as an unlawful alternative to arbitration. 353 U.S. at 34. To be sure, "most of the litigation concerning union status quo violations has involved strikes, [but] the rules developed in those cases also apply to other concerted actions designed to exert economic pressure by interfering with the carrier's normal operations." Douglas L. Leslie, *The Railway Labor Act* 249 (American Bar Association, BNA 1995).[10]

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10. *See, e.g., United Air Lines, Inc. v. IAM & AW*, 243 F.3d 349 (7th Cir.) (slowdown, including ban of voluntary overtime, should have been enjoined), *cert. denied*, 122 S. Ct. 202 (2001); *Delta Air Lines, Inc. v. ALPA*, 238 F.3d 1300 (11th Cir.) (pilot union should have been enjoined to exert every reasonable effort to stop pilots' collective ban on voluntary overtime), *cert. denied*, 532 U.S. 1019 (2001); *Long Island R.R. v. System Fed'n No. 156*, 368 F.2d 50, 52 (2d Cir. 1966) (slowdown enjoined when the union urged its members to "follow the rules strictly"); *Itasca Lodge 2029 v. Railway Express Agency, Inc.*, 391 F.2d 657 (8th Cir. 1968) (enjoining union from calling special meetings that disrupted operations and had effect of strike); *American Airlines, Inc. v. TWU*, 84 LRRM (BNA) 2114 (N.D. Tex. 1972) (affirming injunction against "concerted and deliberate efforts to reduce output and efficiency in order to gain concessions from the employer . . . outside of and without regard to the grievance and arbitration procedures"), *aff'd mem.*, 474 F.2d 1344 (5th Cir. 1973); *Texas Int'l Airlines, Inc. v. ALPA*, 518 F. Supp. 203, 210 (S.D. Tex. 1981) (union urging pilots to "be professional" and maintain their "standards of operations" and "adhere to company policies, and contractual agreements" are indicia of unlawful job action); *COMAIR, Inc. v. ALPA*, No. 99-250 (E.D. Ky. Dec. 21, 1999) (enjoining pilot slowdown; "Defendant and ALPA and its members have violated the

(Cont'd)

As a practical matter, the law could not be otherwise if the Act is to work. Given the enormous discretion airlines necessarily give to their employees — especially to pilots — in effecting the carrier's operations, the court of appeals' rule permitting job actions short of strikes would be disastrous. Unions are adept at the "inside game," and often prefer it to strikes because the Union can maintain some degree of "plausible deniability,"[11] and its members can continue to work, draw their pay checks, and are not subject to permanent replacement.[12] The preferred tactics include work-to-rule or

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status quo by the manner and means in which its members have written-up mechanical deficiencies"); *Metro-North Commuter R.R. v. Local 808, Teamsters*, 1988 U.S. Dist. LEXIS 10648, at *4-5 (S.D.N.Y. 1988) (concerted ban on overtime enjoined; prior to job action, employees were not required to work overtime but customarily and regularly sought this lucrative work; union instructed its members not to work overtime except in emergency situations; "The clear inference . . . is that [union's] purpose was to put pressure on [the carrier] in the ongoing negotiations over a new collective bargaining agreement"); *Long Island R.R. v. System Fed'n No. 156*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968) (slowdown and concerted refusal to work overtime "clearly constituted a change in the practice existing prior to July 26, 1968, and a form of self-help designed to bring pressure against the railroad and to defeat the purposes of the Railway Labor Act").

11. For example, in *Delta*, 238 F.3d at 1302-303, the pilots' union urged its members to stay "united" and emphasized the "individual choice" of its members to refrain from bidding on overtime. In court, the union maintained that it was a mere bystander to the "grass roots" efforts of its members which it had no obligation to correct. The Eleventh Circuit concluded otherwise.

12. The International Association of Machinists' primer, "The Inside Game," pp. 16-17, provides:

> The central idea of a "work-to-rule" campaign is the same in any place of employment, . . . — do only what you were hired to do, what you are absolutely required to do. . . . Work exactly to your job description. . . . If your contract

(Cont'd)

"fly safe" campaigns, overtime embargoes, the increased use of fuel, decreases in on-time performance, and sick-outs. Pilots, in particular, have been able to abuse the commitment of every airline to safety, and the exceedingly complex work and scheduling rules in the industry, by engaging in a variety of unlawful practices aimed at forcing labor disputes away from the arbitrator and the bargaining table. For example, if pilots collectively increase the rate at which they burn fuel or inappropriately increase the number of maintenance items they "write up," they can impose enormous costs on the carrier in a manner that makes discipline of the individual pilots almost impossible, lest the carrier be accused of disregarding "safety" or passenger comfort. If the union's telephone hotline or email messages "remind" pilots to make sure that they execute their pre-flight checks meticulously and thus "fly safe," or if they exhort members to call in sick if they feel unwell (after describing a bargaining or grievance dispute with management) how can the airline effectively respond?

Airline unions lately have been particularly fond of the overtime embargo as a means for compelling an end to labor disputes on their terms, taking refuge in the fact that *on an individual basis*, overtime is usually voluntary and pilots *acting as individuals* are typically permitted contractually to refuse to bid for the extra flying. *See, e.g., United Air Lines, Inc. v. IAM & AW,* 243 F.3d 349 (7th Cir.) (slowdown, including ban of voluntary overtime), *cert. denied,* 122 S. Ct. 202 (2001); *Delta Air Lines, Inc. v. ALPA,* 238 F.3d 1300 (11th Cir.) (collective

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> permits, refuse to work overtime or resist overtime by whatever means are legally available. Work to the clock. If your hours are up, leave your work where it is and do not hurry to finish tasks "under the whistle."

A cartoon character tells the boss "Eighty-three people called in sick, nobody will work overtime, the phones are jammed and Miss Hadley refuses to walk your dog." A copy of this manual has been lodged with the Clerk's Office for the Court's convenience, and copies have been served on the parties.

ban on voluntary overtime), *cert. denied*, 532 U.S. 1019 (2001). In these cases, the union knows and counts on the fact that it will be all but impossible for the airline to distinguish those individuals acting under the union's direction from those simply choosing to avoid the extra work.

Here, of course, those difficult factual questions are not presented. The district court found, and the court of appeals agreed, that the precipitous decline in overtime was *not* the result of individual pilot choice, but the consequence of a plan conceived and executed by the Teamsters and its officers, and enforced by harassment of those with the temerity to resist the Union's dictates. Whatever contractual rights an *individual* might have, a concerted job action designed to force the airline to surrender on a contractual dispute is impermissible.[13]

Moreover, the Act was intended "[t]o avoid any interruption to commerce *or* to the operation of any carrier engaged therein"; the phrase is in the disjunctive. 45 U.S.C. § 151a (emphasis added). While *interstate commerce* may not have been interrupted by the Teamsters' overtime embargo (because no flights were canceled or delayed), the operations of ABX were. ABX's normal operations include bidding on and operating "seasonal" traffic. ABX's customers expect the carrier, like all cargo airlines, to be capable of handling seasonal surges in shipments. If a cargo carrier cannot transport the seasonal traffic, the customer may move all of its business — seasonal as well as the routine, year round shipments — to a competitor. The Teamsters' campaign against volunteer flying shut down the seasonal portion of the airline's normal operations, thereby

13. ABX did not sue over a claimed *contractual* right to force overtime; it sought to enforce a *statutory* obligation on the part of the Teamsters and its members to refrain from self-help in derogation of the RLA's mandatory procedures. The Teamsters may argue that a "minor dispute" exists over the ability of pilots to exercise *collectively* the contractual right each pilot *individually* possesses to refuse to volunteer for overtime, but the district court and the court of appeals held to the contrary, Pet. App. 8a-9a; 20a-21a, and the meaning of the contract is irrelevant in this context.

costing ABX $3 million in likely profits and damaging its reputation among potential customers.

Finally, the rule adopted by the court of appeals poses a Hobson's choice for management by creating a perverse incentive for the carrier to eschew mitigating measures that might be taken to minimize the impact of union self-help on the traveling and shipping public. Rather than attempting to mitigate the operational impact of the job action, an airline faced with a union-enforced overtime embargo would be well-advised to cancel the flights that could not otherwise be staffed, leaving unserved the passengers or shippers involved. Under the Sixth Circuit's new rule, only in this circumstance would the airline be entitled to injunctive relief. There is nothing in the text of the statute or its animating purposes to recommend such a bizarre and counter-productive result, and the court of appeals offered no rationale for that conclusion.

III. This Case Is Appropriate For Summary Reversal

This Court has the discretion to dispose of cases like this one summarily. Rule 16.1. In the past, the Court has used this device to decide cases that at once pose questions important enough to review, but also involve settled law, undisputed facts, and clear legal error. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001) (summarily reversing where opinion below "cannot remotely" be reconciled with what "[the Court's] cases require"); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505, 510 (2001) (reversing summarily where decision below was "baffling" and "conflict[ed] with [this Court's] cases"); *Ohio v. Reiner*, 532 U.S. 17, 18 (2001) (reversing summarily where the facts were clear and the Court's "precedents dictate" reversal).

As explained above, review of the decision below is critical to the rail and airline industries, because it threatens the continued viability of the RLA's processes. The case, however, could hardly be more straightforward. The court of appeals held that the union was entitled to use the Act's grievance procedures

if it liked, but could elect to use economic self-help instead if it found that alternative more efficacious. No further briefing or argument is needed either to identify the error in that conclusion or to correct it. Accordingly, the Court should grant certiorari and summarily reverse.

CONCLUSION

The petition should be granted and the decision of the court of appeals reversed.

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No. 01-914

IN THE

Supreme Court of the United States

ABX AIR, INC.,

Petitioner,

v.

AIRLINE PROFESSIONALS ASSOCIATION OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 1224, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RULE 29.6 STATEMENT

Petitioner, ABX Air, Inc., is wholly owned by Airborne, Inc.

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INTRODUCTION

Respondent's Brief in Opposition (hereinafter "Opp.") all but ignores the text and history of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188, in favor of rearguing a version of the facts rejected by both the trial and appellate courts and then manipulating that version of the "facts" to fit a narrowly-construed characterization of the issue in dispute.

The issue in this case, as framed by Respondent, involves the meaning of the word "strike," Opp. at p. 7, a term that appears nowhere in the RLA. Having thus crafted the issue, Respondent fails to address what is at the "heart" of the Act, see *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969), and this case - the "core duties," *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 310 (1989) (hereinafter "Conrail"), to exert every reasonable effort to "make and maintain agreements" and to "settle all disputes." 45 U.S.C. § 152, First.[1]

The facts here, as found by the district court and affirmed by the court of appeals, demonstrate that, rather than "exert[ing] every reasonable effort" to settle its dispute with ABX over the three-days-off rule, Respondent resorted to economic coercion. Respondent also failed to comply with its obligation under Section 204, 45 U.S.C. § 184, to resolve its minor dispute with ABX "exclusively" through arbitration. *See Brotherhood of Locomotive Eng'rs v. Louisville and Nashville R.R. Co.*, 363 U.S. 33, 38 (1963) (hereinafter "Louisville").

The Sixth Circuit's opinion – effectively reversing the district court's enforcement of the RLA's dispute resolution provisions - cannot be reconciled with the plain language of the statute, the intent behind its provisions, relevant precedent from this Court, or persuasive decisions from other circuits. Because this is a matter of great importance not only to

1. Respondent's sole reference to Section 2, First, *Opp.* at p. 15, is offered to support a proposition not at issue here – that the RLA contains different procedures for the resolution of major and minor disputes.

Petitioner, but also to the entire aviation and rail industry, the decision below warrants this Court's review, if not summary reversal.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's Decision Conflicts With Precedent From This Court On A Matter Of Great Importance To The Administration Of The Railway Labor Act.

Respondent claims that the Sixth Circuit's decision does not conflict with *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R.*, 353 U.S. 30 (1957) (hereinafter "Chicago River") and *Louisville* because those cases involved "full-blown" strikes and "out-and-out work stoppages." *Opp.* at p. 19. Respondent, like the court below, misapprehends *Chicago River* and *Louisville*, unduly restricting judicial authority to enforce the mandatory dispute resolution provisions of the RLA.

In *Chicago River*, this Court recognized with respect to minor disputes what had already been established in connection with other RLA dispute resolution mechanisms – federal courts may issue injunctions in order to "enforce compliance with the requirements of the Railway Labor Act." 353 U.S. at 42 (quoting *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952)). One of the "requirements of the Railway Labor Act," indeed, the "requirement" at issue in *Chicago River*, *Louisville*, and this case, is the obligation to arbitrate minor disputes as the "mandatory, exclusive, and comprehensive" system of dispute resolution.[2] *See Louisville*, 373 U.S. at 38. Traditional work stoppages simply happened to

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2. Respondent claims that no "intended or actual evasion of the dispute resolution and arbitration procedures" of the RLA occurred because the parties eventually arbitrated the three-days-off dispute. *Opp.* at p. 20. This mischaracterizes the Act. The RLA does not permit parties to resort to economic self-help *in addition to* arbitration. Indeed, *Louisville* involved strike activity threatened *after* the arbitration decision had been rendered. A party who resorts to economic self-help over a minor dispute is *not* treating the RLA dispute resolution procedures as "comprehensive" or "exclusive," in violation of the Act.

be the activity conflicting with the requirements of the RLA in *Chicago River* and *Louisville*. Here, it was an open flying ban.

The Sixth Circuit's conclusion that Respondent could permissibly exercise "strategic leverage in a minor dispute," and "pressure ABX in resolving the three-days-off rule dispute" *see Petition for a Writ of Certiorari Appendix* (hereinafter "App.") at 13a, cannot be reconciled with *Chicago River* and *Louisville*.

II. The Opinion Below Conflicts With Decisions From Two Other Circuits On The Same Important Federal Question – Whether A Ban On Open Flying Violates Section 2, First Of The RLA.

Respondent concedes that courts often enjoin "something less than out-and-out work stoppages," including open flying bans, but distinguishes those cases as having involved flight cancellations or delays. *See Opp.* at pp. 9-11. This is another distinction without significance. In none of those cases, including *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 238 F.3d 1300 (11th Cir.), *cert. denied*, 532 U.S. 1019 (2001) (hereinafter "Delta") and *United Air Lines, Inc. v. Int'l Ass'n of Machinists*, 243 F.3d 349 (7th Cir.), *cert. denied*, 122 S. Ct. 202 (2001), did a court even imply that cancellations or delays are a prerequisite to injunctive relief. The decision below conflicts with *Delta* and *United* in that both of those cases held that overtime bans violate Section 2, First, which applies to all RLA carriers and unions, regardless of the nature of their dispute.

III. The Sixth Circuit Has Decided An Important Issue Of RLA Administration Which Has Not Been, But Should Be, Decided By This Court.

The court below compounded its error by misinterpreting the phrase "interruption of operations," found in both Section 2, First of the RLA and in the definition of "strike" within the National Labor Relations Act ("NLRA"), 29 U.S.C. § 142(2). The court held that no "interruption of operations" so as to warrant injunctive relief under the RLA could exist absent "sufficient" economic harm in the form of higher costs and lost

business opportunities or impairment to a carrier's "regular" business base.[3] Assuming, for the moment, that the court below correctly determined that injunctive relief is unavailable under the RLA absent a "strike" or an "interruption to operations,"[4] it interpreted those terms in an unprecedented and erroneous manner, threatening the orderly resolution of minor disputes.

Respondent claims that no "interruption of operations" occurred because no flights were cancelled or delayed as a result of its open flying ban. "At a minimum," it asserts, "the concept of an 'interruption' should mean an interruption in a carrier's transportation services," to the public; a mere loss of profit or additional cost to the carrier is insufficient.[5] *Opp.* at pp. 7-9.

3. The court ostensibly found support in one case – *Air Line Pilots Ass'n v. United Airlines, Inc.*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). However, in that case, there was no evidence that the union was involved in the alleged "sick-out", or, indeed, that such a sick-out had taken place. *Id.* at 905-906. Also, there was "no evidence . . . that United was harmed" by the travel agent campaign and picketing; United had provided no "evidence that it suffered *any* resulting economic harm" from such actions. *Id.* at 907 (emphasis added). Here, by contrast, there is no question that: (1) an open-flying ban occurred; (2) Respondent conceived, implemented, and enforced the ban; and (3) ABX suffered over $3.2 million in economic damages as a result of Respondent's actions.

4. The "interruption of operations" language appears only as a *goal* of the RLA. *See* 45 U.S.C. § 152, First ("It shall be the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . *in order to* avoid any interruption to commerce or to the operation of any carrier. . . ."); *see also* 45 U.S.C. § 151a. The term "strike" is completely absent from the statute. Accordingly, injunctive relief should be available in connection with a minor dispute where one of the parties demonstrates that the other party has failed to comply with the dispute resolution mechanisms of the Act, regardless of the existence of a "strike" or other "interruption of operations." *See Conrail*, 491 U.S. at 303 (injunctive relief is available under the RLA without the "customary showing" of irreparable harm).

5. Only under the most naïve view of business economics could one assert that, absent cancelled or delayed flights, the public is

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In any event, Respondent claims, $3.2 million in losses is insufficient to constitute an "interruption of operations" given Petitioner's revenues.[6] Respondent, like the court below, provides no measure for what would be considered sufficient economic harm to warrant injunctive relief under the RLA.[7]

Respondent's arguments would rewrite the labor statutes. Neither the RLA nor the NLRA mention an interruption in the "services" provided to the "public." The RLA proscribes an interruption to "carrier" "operations." Petitioner's "operations" were "interrupted" when Respondent intentionally hindered the uniformity and continuity of the staffing process through its

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not injured by economic losses to carriers. Indeed, the legislative history cited by Respondent confirms that "efficiency" in the provision of transportation services was one of the goals of the RLA. *See Opp.* at p. 8 (*citing* H.R. Rep. No. 328, 69th Cong., 1st Sess. p. 1, quoted in, *Union Pac. R.R. v. Price*, 360 U.S. 601, 609 (1959)). Transportation services cannot be "efficiently" provided where carrier costs are intentionally inflated to coerce the favorable resolution of a minor dispute. This does not mean that every union activity that raises carrier costs is unlawful under the RLA. *See Opp.* at p. 12. However, where parties threaten the orderly dispute resolution system of the Act by resorting to economic self-help, such practices may and must be enjoined.

6. Such a "relativist" view of damages has been labeled "specious" by courts in other injunction cases. *See Ferrero v. Associated Materials*, 923 F.2d 1441, 1149 (11th Cir. 1991) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham*, 658 F.2d 1098, 1102 n.8 (5th Cir. 1981)).

7. Respondent would have this determination made on a case-by-case basis by the district courts. *See Opp.* at p. 23. This approach is unacceptable. With no guidance on when unlawful activity, as defined by the RLA, has occurred, carriers would have one option in the face of economic self-help by union members – cancel or delay flights. This is an intolerable state of affairs for carriers, their employees, and the public.

concerted ban on open flying.[8] Moreover, the RLA proscribes "any" interruption to carrier operations. *See* 45 U.S.C. § 152, First. There is, accordingly, no statutory basis for the assertion that, while *some* unidentifiable amount of economic loss would be sufficient to constitute an "interruption to operations," $3.2 million is not enough. Over three million dollars in losses certainly qualifies as "any" under the plain meaning of that term, regardless of Petitioner's revenues.

In the end, the Sixth Circuit has added a requirement to the exercise of federal court jurisdiction under *Chicago River* – an "interruption of operations," as narrowly defined by that court, must exist. This issue has not previously been considered by this Court; yet, its importance to the industry and the administration of the RLA is great.[9] Already in the Sixth Circuit, *see CSX Transp., Inc. v. Marquar*, 980 F.2d 359 (6th Cir. 1992), and two others, *see Norfolk S. Ry. v. Brotherhood of Locomotive Eng'rs*, 217 F.3d 181 (4th Cir. 2000); *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993), air and rail

8. To "interrupt" is "to cause a delay or break in; hinder the doing or completion of; to break the continuity, course or sameness of." *Webster's Dictionary* 512 (1992). The ordinary meaning of the term "operation" is a "course or series of acts to effect a certain purpose." *Id.* at 681. By contrast, a "service" is commonly defined as a "useful result or product of labor which is not a tangible commodity[.]" *Id.* at 833. Thus, while Petitioner's "service" is to transport time sensitive materials nationwide, its operations are far broader. They consist of all the business-related endeavors ABX undertakes to provide its "service," including maintaining an orderly and efficient process for staffing flights.

9. Respondent questions the importance of this case, claiming that it presents a "very limited and fact-specific dispute under the parties' collective bargaining agreement." *See Opp.* at p. 1. This is inaccurate. As the court in *Delta* noted, 238 F.3d at 1307, "it is clear industry practice to structure flight schedules with 'open time' built in." Certainly, open flying bans have not been unique to ABX. As demonstrated by the fact that three industry groups, representing nearly two dozen major and regional airlines and numerous rail carriers, have sought to file an Amicus brief in this Court, this issue affects the entire industry.

carriers may not recover damages resulting from unlawful self-help. If carriers must also park aircraft, delay flights, or bear tens or hundreds of millions of dollars in economic losses to obtain injunctive relief, the RLA's system for the orderly resolution of disputes will collapse.

IV. There Is No "Minor Dispute" Involving The Open Flying Provisions Of The Collective Bargaining Agreement.

Throughout its Opposition, Respondent mischaracterizes the nature of this case by arguing that it involves a "minor dispute" over the right of crewmembers to bid for open flying. *See, e.g., Opp.* at p. 1 ("The dispute concerns the contractual rights of crewmembers to decline to bid for voluntary extra assignments. . . .").[10] However, both courts below considered and rejected this argument. As the Sixth Circuit noted:

> The Union argues that the record does not support the district court's factual findings that this case involves a minor dispute over the CBA's three-days-off rule and that the Union promoted and directed the open-flying ban in aid of this minor

10. Based on this characterization, Respondent claims that, because no "status quo" obligation attaches to a minor dispute, the open flying ban at issue was lawful. This Court has previously held that a *carrier* may implement its "arguable" view of the contract pending arbitration of a minor dispute. *Conrail*, 491 U.S. at 299. Respondent cites lower court dicta to the effect that "each party" may act on its interpretation of the contract in a minor dispute. *See Opp.* at pp. 16-17. However, none of those cases involved that issue. Indeed, were this the law, utter chaos would reign, as each side implements its "arguably justified" view of the contract. For example, an employee who has been terminated would be entitled to remain in his position pending arbitration, so long as the union asserts an "arguable" claim that the carrier lacked "just cause" for its decision. Certainly, that is not the state of the law today. In any event, even if Respondent's position were correct, no court has ever held that a party may implement its "arguably justified" view of the contract as an economic weapon in connection with a *separate* minor dispute. Were this the law, arbitration would be just one of many options available to parties under the RLA, and the dispute resolution system of the Act would break down.

> dispute. Rather it argues that this case simply involves a minor dispute over Article 13's open-flying provisions, separate and apart from the three-days-off rule. . . .
>
> Overall, the Union reiterates its characterization of the evidence presented at trial, which was contested by ABX, and fails to demonstrate clear error by the district court. . . .

App. at 8a-9a.

There is no dispute, "minor" or otherwise, between the parties as to the right of "individual" crewmembers to refrain from bidding open flying assignments.[11] *See Opp.* at p. 2. This is a statutory dispute over Respondent's noncompliance with the provisions of the RLA. In other words, this case is *not* about "individual" crewmembers who failed to bid for open time, but the union that orchestrated, implemented, and enforced a concerted open flying ban in aid of a minor dispute. It is absurd to assert that the collective bargaining agreement between the parties, "arguably" or otherwise, permits Respondent to organize an open flying ban in aid of a minor dispute. Indeed, a contract that so provided would violate the RLA.

Neither is this case about handbilling, picketing, or other arguably constitutionally-protected activity.[12] *See Opp.* at

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11. Petitioner disputes Respondent's assertion that those "individual" rights include the right to "make common cause with his or her fellow crewmembers" (i.e. act "concertedly"). *See Opp.* at p. 2. At that point, "individual" action becomes unlawful economic self-help.

12. The Court will note that in both cases cited by Respondent on this issue – *Railway Labor Executives Ass'n v. Wheeling & Lake Erie Ry.*, 914 F.2d 53 (4th Cir. 1990), and *Federal Express Corp. v. Teamsters Union, Local # 85*, 617 F.2d 524 (9th Cir. 1980) – the courts noted that picketing could be enjoined in order to enforce the mandatory dispute resolution procedures of the RLA. In *Federal Express*, 617 F.2d at 526, "neither party ha[d] pointed to any procedure of the RLA which [the union] ha[d] failed to follow, nor [could the court] find any." (Cont'd)

pp. 12-13. Nothing in the Constitution or other relevant federal law permits a union to organize a "no overtime" campaign in order to coerce the favorable settlement of an otherwise arbitrable contractual dispute. Rather, the RLA, and every relevant decision by federal courts (except the Sixth Circuit) forbid such conduct.

CONCLUSION

For the reasons noted herein, as well as in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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Thus, no injunction was issued. In *Wheeling*, an injunction against picketing was *affirmed* because the union had violated the "exclusive" means for resolving "representation" disputes under the RLA, 45 U.S.C. § 152, Ninth.